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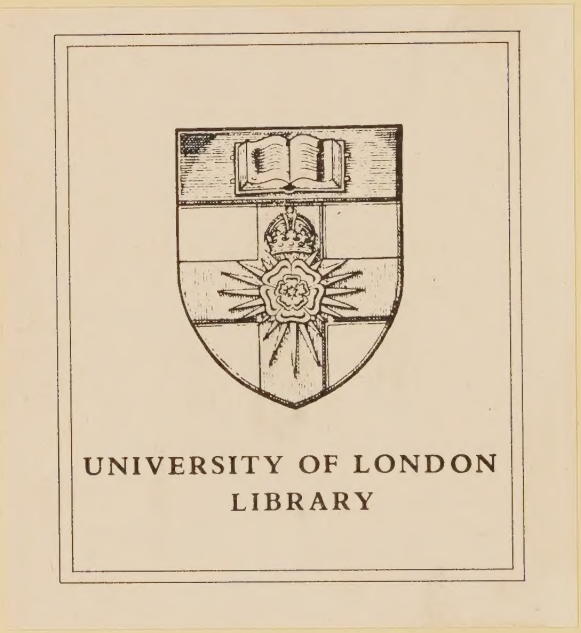

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IN IRELAND,

AND

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CORRIGENDA.

Page 76, line 16, *for* "*Jackson* v. *Russell*," *read* "*Russell* v. *Jackson*."

,, 224, ,, 5 from foot, *delete* inverted commas.

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND.

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1903.

BEATTIE *v.* CORDNER.

(1888. No. 10,168.)

M. R. 1902. June 21. *Appeal.* July 9.

Practice—Administration—Secured creditor—Proof by, against the real estate—Real estate likely to prove deficient—Lapse of eleven years—Application to prove against personalty—Funds in Court.

In an action for administration of assets, the primary decree had been made on the 26th July, 1888. A mortgagee on portion of the real estate proved his debt against the realty alone on the 13th February, 1889. In May, 1890, leave was given by the Court to present a petition to the Land Judge for sale of the real estate, including the lands comprised in the mortgage. The order for sale was made by the Land Judge, and a receiver was appointed. At the time that the mortgagee proved against the real estate it was believed that the proceeds of the sale of the realty would be sufficient to pay the mortgages. Subsequently the security became depreciated owing to circumstances beyond the control of the mortgagees, and was insufficient for payment of the incumbrances. Some simple contract creditors had proved against the personal estate, but there was more than enough money in Court to pay their debts.

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On the 9th June, 1902, the mortgagee applied for leave to prove against the personal estate the amount of his mortgage debt and interest:—

Held (reversing the order of Porter, M.R.), that the money being still in Court, the mortgagee was entitled to prove against the personal estate, so long as the rights of the other creditors who had already proved against the personalty were not affected.

BY indenture of mortgage, dated the 17th December, 1877, Richard Davidson Harrison mortgaged the Ardkeen estate, in the county of Down, to secure £8000 and interest to Maria Kirk and William N. Wallace. Maria Kirk died in April, 1881, and the said sum of £8000 became vested in William N. Wallace. By indenture, dated the 15th April, 1891, William N. Wallace assigned the mortgage to Robert H. Wallace and himself.

Of this sum of £8000, £7000 was due to George E. Kirk, and the remaining £1000 was due to Pardo A. Kirk, and was vested in the trustees of his marriage settlement.

By indenture, dated the 26th March, 1902, Robert H. Wallace assigned to George E. Kirk £7000, portion of the mortgage for £8000; and there was due on this mortgage £7000 for principal, together with £3751 for interest down to the 25th May, 1902.

Richard Davidson Harrison died on the 9th January, 1888, and his will was proved by Clement Cordner, one of the executors. On the 27th April, 1888, the present suit was instituted to administer the real and personal estate of Richard Davidson Harrison. The primary decree was made on the 26th July, 1888, by which it was directed that the testator's personal estate should be applied in payment of his debts; and if it was insufficient it was ordered that inquiries should be made as to what real estate the testator was seized of and what incumbrances affected the same. From the commencement of the proceedings down to the end of 1901 it was considered that the personal estate of Richard Davidson Harrison was insufficient to discharge the simple contract creditors, and that the real estate would have to be resorted to.

On the 13th February, 1889, an affidavit was sworn by W. N. Wallace, proving the claim on foot of the mortgage against the real estate of Richard Davidson Harrison comprised in the mortgage.

In May, 1890, leave was given by the Master of the Rolls to Pardo Kirk, who was also a *puisne* mortgagee on the lands comprised in the mortgage of 1877, with other lands not comprised therein, to present a petition to the Land Judge for sale of all the lands. A petition for sale was presented, and a receiver was appointed in the matter on the 9th November, 1891. The rental of the agricultural portion of the estate had been settled, a request had been issued to the Irish Land Commission under the 40th section of the Land Law (Ireland) Act, 1896, and the lands had been inspected, but no report had been received.

The gross rental of the Ardkeen estate, upon which the mortgage of the 17th December, 1877, alone was charged, amounted to £2322 2*s*. 9*d*., and there was a small head-rent in addition of £4 10*s*. Assuming that the entire would sell for twenty years' purchase, it would amount to £46,532, from which there would have to be deducted a sum of £6296, being the estimated price for the redemption of the superior interests affecting the said lands, leaving a balance of £40,236. This was exclusive of the costs of sale and redemption. The incumbrances charged on the Ardkeen estate prior to the mortgage of the 17th December, 1877, as appeared by an order of the Land Judge's Court, fixing priorities, dated the 22nd April, 1902, amounted to £34,587 17*s*. 9*d*. In addition to that, there was an annuity of £250 charged on the lands in favour of Mrs. Withers, formerly wife of Henry Harrison, deceased. This annuity was also charged on lands known as Holywood House and demesne, and had not been formally apportioned, but the proportions payable out of the Ardkeen estate and out of the Holywood House and demesne had been fixed, pursuant to a ruling of the Land Judge, at £209 and £41 respectively. The judgment on further consideration on the Chief Clerk's certificate was pronounced on the 26th July, 1899. The amount of money in Court to the credit of the cause amounted to £5600, and the debts of the creditors who had proved against the personal estate amounted to £2176.

In addition to the real estate comprised in the mortgage of the 17th December, 1877, Richard Davidson Harrison was entitled to a reversionary interest in estates of which his uncle, the late John Harrison, was then tenant for life, situate in the county of

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Down, and in the cities of Belfast and Dublin. These reversionary estates were in the possession of Henry Harrison, as residuary legatee of his brother Richard Davidson Harrison, the testator in this matter.

On the 9th June, 1902, George Kirk applied to the Master of the Rolls for an order for leave to prove against the personal estate in respect of the principal sum of £7000, and all arrears of interest due thereon, and that in the event of the personal estate of Richard Davidson Harrison proving insufficient, that his real estate should be administered.

Henry Harrison, the residuary legatee and devisee of Richard Davidson Harrison, filed an affidavit in opposition to the motion, in which he stated that the mortgagee, having full knowledge of the proceedings at every stage, elected to rely on the security of the lands. In consequence he was led to believe that he was entitled to the reversionary real estate of the testator. In 1899 he applied for, and obtained, carriage of the proceedings in the present action, which, he stated, had been left derelict, and devoted his time and energy to prosecuting the action, and a very large amount of the funds in Court had been collected owing to his exertions. The litigation which he so took up was very heavy and lengthened, both in the Chancery Division and the Land Judge's Court, and he was obliged to give up a position he occupied as an insurance manager so as to devote his time to the law suit. He further stated that if the mortgagees had sold the lands within a reasonable time, the proceeds of the sale would have been sufficient to pay the mortgages, but owing to the long delay the rental of the property was reduced in consequence of the tenants getting fair rents fixed for the second term.

Gordon, K.C., and *Hume, K.C.* (with them *Ronan, K.C.*, and *Whitaker*), in support of the application.

Matheson, K.C., *Molony, K.C.*, and *M'Cann*, for Mr. Henry Harrison; and *D. M. Wilson*, for the plaintiff, *contra*.

THE MASTER OF THE ROLLS:—

The present application is moved almost as a matter of right, and has been so presented both by Mr. Hume and Mr. Gordon.

Mr. Hume did suggest that terms might be imposed, but, subject to the imposition of terms, he contended that the granting of the application was a matter of absolute right. I do not think that is so. I have been referred to no authority which shows that where there is a fund in Court creditors who have not proved their claims are enabled, as a matter of right, to come in and do so. If, then, it is not a matter of right, but a matter of indulgence, the facts of each particular case must be examined, and whether or not the favour is to be granted must be considered in reference to what has been done in the suit and in reference to the rights of other parties.

The suit in which this application is made resulted, in the first instance, in an administration decree of 26th July, 1888, which is now nearly fourteen years ago. That administration decree was made with the object of preventing any claims from acquiring an inequitable priority over others. The suit was commenced a short time before the date of the decree, and not long after the death of Richard Davidson Harrison. It was a creditor's suit, and the plaintiff was suing on behalf of himself and other creditors, and he would have had a right to an administration of both personal and real estate. The decree, after directing the usual accounts and inquiries as regards personal estate and the payment of debts, then goes on:—"It is ordered that the following inquiries be made, that is to say: No. 5. An inquiry what real estate the testator was seized of or entitled to at the the time of his death. No. 6. An inquiry what incumbrances (if any) affect the testator's real estate, or any and what parts thereof."

That decree was made and the case went to Chambers, and there were the usual advertisements for creditors and incumbrancers. The applicant on the present occasion, Mr. George Kirk, was a *cestui que trust*, his trustee in a mortgage of 17th December, 1877, being William Nevin Wallace. It is not stated that he was a minor at that time, and I think he was not; and even if he was at the date of the execution of the mortgage, he at any rate must have come of age shortly afterwards. The mortgage must be treated as one made to William Nevin Wallace; and if any rights are prejudiced by his acts as trustee, that

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is the misfortune of his position, and persons are often bound by the acts of their trustees as between themselves and others. This was decided by the Court of Appeal in *Owens' Estate*. Then this course was adopted in the administration proceedings. There was a claim which might have been proved against the estate by contract on foot of a mortgage for £8000, and interest at 6 per cent., reducible to 4½ and 5 per cent. if paid within fifteen or thirty days respectively after the gale days. Under the circumstances, at that time everybody thought that the mortgage was well secured, and that fact has been relied on by the applicant as explaining his action in the matter. What then did he do? There was, on his part, a deliberate abstention from making any claim under the general posting for creditors, and accordingly there was no claim put forward on foot of the covenant in the mortgage as affecting personal estate, because it was then supposed that the personal estate would be insufficient, while the mortgage was deemed to be perfectly secured upon the realty. The claim sent in was verified by the affidavit of William Nevin Wallace, filed by Warnock, his partner, the appearance entered in the suit being filed by William Nevin Wallace, and it states the claim as follows:—"That the said principal sums of £8000 and £3500, secured by the said indentures of mortgage of the 17th December, 1877, and 2nd April, 1882, are now justly and fairly due to me; and that on both said mortgages of the 17th December, 1877, and 2nd April, 1882, there is now justly and fairly due to me a sum of £1361 6*s.* 3*d.* for arrears of interest, the particulars whereof are set forth, etc."

Did the parties know that the mortgage of 1877 contained a covenant for payment of the money? They must have done so, for the first paragraph of the affidavit states that it did. What then was the result? The result was, that the mortgagee deliberately and with his eyes open abstained from proving his claim against the general assets, and determined to rely on his claim against the specifically charged lands. It is not a case like one which was referred to by Mr. Hume, where a creditor proceeds to prove his claim and finds the security is not sufficient, and then goes against the general assets. If in this case he had come forward as a creditor, he might (it was argued) have had to

elect whether he would value his security or not, which is sometimes a difficult matter, though it is not clear that he would have had to do so, the security being, so far as I know, upon property exclusively that of the mortgagor, though this was not relied on on behalf of Mr. Kirk. At any rate, he could have taken advantage of the suit as it stood. There was no answer to his claim. There must have been an immediate administration of the general assets, and the real estate would have been administered in a short time concurrently with the personal estate. But all that has been entirely altered in consequence of that course not having been adopted.

The plaintiff sued as representing the creditors. All of them had seen the proceedings narrowed down to proceedings by creditors who had appeared to prove; and down to the present time nothing was done to suggest that any claim would have been made by the applicant on foot of his mortgage, except that everybody knew that such claim could have been made, and was not. And now, after the lapse of years, after the rights of the estate and the creditors have been ascertained, after a prolonged series of struggles, in the year 1902, when there now turns out a likelihood that there may be a fund which will leave a surplus after the payment of costs and the creditors as ascertained, Mr. Kirk puts forward his claim as being entitled to a very substantial part of the mortgage of 17th December, 1877, a sum of £7000 and interest, and says: "I now come in to undo what has been done before this, and to get the benefit of the suit as matter of right, and to avail myself of the proceedings which have taken place." This result would involve the recasting of everything that has been already done. The creditors would all have to abate the surplus of their claims, until the problematical realization of the real estate; and it is said that this must be done as a matter of right, because if the application is not acceded to the Court will be deliberately parting with money which specifically belongs to, and is the money of, Kirk. It is nothing of the kind. A creditor, no doubt, has a right to claim against an estate in respect of his security; but he can abandon his claim. It may be lost by his standing by, by *laches* or acquiescence, by allowing parties to proceed in reference to their rights on an assumption of

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facts which he represents, or must be taken as representing, to exist; and he may thus abandon that which otherwise he would have had a perfect right to.

Mr. Hume in his argument cited the case of *Gurney* v. *Lord Oranmore* (1) in support of his contention; but that case has really no reference to the present one, as will be seen from the observations of the Lord Chancellor in the very next case: *Gurney* v. *Oranmore* (*Browne's Case*) (2). The Lord Chancellor says: "This is a very different case from the other appeal motion in this cause. In that the applicant was not a party to the cause, and I was satisfied that there was no equitable ground for resisting the claim, as I came to the conclusion that the trustee for the Infirmary, who had proved in the cause, was not aware of the security on which reliance was subsequently placed; and I thought, as there was no technical bar to the relief sought, that it was safe to make the order." That is because the trustee of the Mayo Infirmary was not aware of the security which was afterwards relied on, and because he had acted in a perfectly reasonable way, without either *laches* or acquiescence. "Here," he says, "Mr. John Geoffrey Browne, who claims a large sum, was made a party in the cause, no doubt a notice party, and ostensibly as owner of certain judgments; but he was informed of the plaintiff's rights in that case. If he allowed the suit to proceed against him upon the notice, it might have been different; but he did not do so. He employed an attorney to look after his rights, and entered an appearance, so that the cause then assumed the character of a plenary suit against him, with all the consequences thereof. Now, it is alleged that he was misled by the nature of the notice served upon him, but that case is not consistent with the statements in the affidavits, from which it appears that Mr. Browne deliberately, and knowing his rights, determined that he would rely on his security on the other lands."

These observations apply tenfold more strongly in the present case. No doubt this case differs technically in this that, though William Nevin Wallace was a party, his *cestui que trust* was not, while the claimant in *Gurney* v. *Oranmore* (2) had been made a party to the cause. Still William Nevin Wallace was a party to

(1) 5 Ir. Ch. R. 436. (2) *Ibid.* 447.

these proceedings. The Lord Chancellor continues:—"The whole case made by the affidavits is, not that he was misled, or that he was not aware of his rights, but that his conduct was the result of his deliberate determination, for which he doubtlessly had sufficient grounds. He probably believed that other estate to afford ample security, and was unwilling to lose a high rate of interest. I will assume then that what Mr. Browne did, when he knew all the facts, he would have done if he had not been served with the notice, especially as he makes no allegation in his affidavit that he was in point of fact misled. What does appear is this: that he deliberately determined not to take any advantage of these proceedings, to allow the plaintiff to go on to obtain a decree for sale, and to proceed on the belief that his demands were perfectly safe." The facts, as stated in the affidavit of Mr. Dillon, show that these observations apply strongly to the present case. And he says: "Now it is no light thing that a person should be thus allowed to remain under an error in respect to his circumstances, that he should be permitted to go on regulating his establishment under the belief that he is entitled to a large sum under a decree in a suit, and that a party to that suit should afterwards try to displace those rights. I do not know how the plaintiff may be circumstanced in point of means; but whatever his circumstances may be, it is no trifling matter to be allowed for ten or twelve years to indulge the belief that he has a decree of the Court in his favour, and then to be turned round in this way." Here no technical point arises in reference to the applicant not being a party to the proceedings. He was a party to the proceedings for all these purposes, he had a complete knowledge of everything connected with the suit and all that was done in it, and he deliberately determined to refuse to come in and say whether or not he would claim anything outside his security; he refused to run the risk of losing the high rate of interest he was getting. If he had come in the whole suit would have been different. There would have been an administration of the real estate, and it would have been sold, and the rights of the parties would have been dealt with accordingly. And it is stated in the affidavit of Mr. Harrison that, as the facts were, if a sale of the lands had been held within a reasonable time, it would have resulted in providing a fund

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sufficient to have discharged the mortgage of 17th December, 1877, in full; and that since that time there have been second fair rents fixed, and the interest has kept running on, rendering the security of the lands insufficient, and causing a change in the position of the owners of the estate, who never would have undertaken the thankless task of working through all these most prolonged, harassing, and distressing proceedings if it had been obvious that they never would be able to realize one farthing out of the estate.

The case is one in which the merits are entirely against the application, and, as I am not coerced to grant it, I must refuse it with costs.

R. W. L.

Appeal. July 9.

The mortgagee appealed (1).

Ronan, K.C., Gordon, K.C., Hume, K.C., and *W. M. Whitaker*, for the appellant:—

As against creditors who have proved, we do not claim any right, but a residuary devisee and legatee cannot take any higher position than the testator. A mortgagee was always entitled to come in and prove while the property was before the Court: *Re McMurdo*; *Penfield* v. *McMurdo* (2); *Leahy* v. *De Moleyns* (3).

D. M. Wilson, for the plaintiff, a creditor.

Matheson, K.C., Molony, K.C., and *M'Cann*, for Mr. H. Harrison:—

Where a creditor is guilty of *laches* and acquiescence for a long number of years, a Court of Equity will not allow him to come in and alter the rights and position of others: 1 Dan. Ch. Pr. 829; *Ridgway* v. *Newstead* (4); *Gurney* v. *Oranmore* (5);

(1) Before LORD ASHBOURNE, C., and FITZGIBBON and HOLMES, L.JJ.

(2) 86 L. T. 553. This case was not reported in the Court of Appeal in England at the date of the hearing of *Beattie* v. *Cordner*, but a manuscript copy of the judgment was furnished. The case is reported since—[1902] 2 Ch. 684.

(3) [1896] 1 I. R. 206.

(4) 3 De G. F. & J. 474.

(5) 5 Ir. Ch. R. 447.

Cattell v. *Simons* (1); *Blake* v. *Gale* (2); *Edgar* v. *Plomley* (3); *Mohan* v. *Broughton* (4).

LORD ASHBOURNE, C. :—

This is an interesting and important case, which raises questions requiring much attention. It appears that a suit for the administration of the real and personal estate of Richard Davidson Harrison was instituted fourteen years ago. One of the claims against the estate was a mortgage for £8000, created by indenture, dated the 17th December, 1877, and in the suit the persons entitled to the mortgage swore an affidavit of claim setting out the mortgage, and they indicated that they were satisfied to stand on their security. They brought in their mortgage, and said it was the security to which they would look for payment of their debt, and they showed no desire to prove against the personal estate. For over thirteen years and a-half the mortgagees made no claim whatever against the personal estate for reasons stated by Mr. Harrison himself, that is, they considered at the time that the mortgaged property was adequate security for their debt, and they elected to look to the mortgaged property alone for payment. Then a change occurred; the value of landed property went down, and the revision of rent on the application for fixing a fair rent for the second term cut down the amount available as security for the debt.

The mortgagees then changed their minds, and thirteen and a-half years after the suit was instituted determined to prove against the personalty, if they could do so. The mortgage contained the not unusual covenant on the part of the mortgagor, to pay the principal and interest.

Mr. Harrison objects to this action on the part of the mortgagees, and he says :—Once and for all the mortgagees elected to stand on their security, they intimated that that was what they were going to do, and in consequence of, and acting on, their course of conduct, he had shaped his habits of life and his pursuits accordingly, and it would not be just to him, as residuary legatee, to allow the mortgagees now to reconsider their position,

(1) 8 Beav. 243.
(2) 32 Ch. D. 571.
(3) [1900] A. C. 431.
(4) [1899] P. 211, 219.

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and by going outside the mortgage security make the personal estate liable. The Master of the Rolls in his judgment puts it on the ground of *laches* and the peculiar circumstances of the case; Mr. Harrison in his affidavit puts it also on the ground of personal inconvenience and injustice, and he refers in a way that commands sympathy to the state of his health. There is no one who can help feeling sympathy for him; but we must consider the rights of the mortgagees in the light of the decisions pronounced by Courts of Equity, and the reasoning of those decisions.

No doubt a person coming in at so late a stage of the case to claim what he says are his rights has to make a case, and must submit to terms. When the case came before the Master of the Rolls he thought the case was not made out adequately; possibly his mind was impressed with the sympathy that Mr. Harrison's case was entitled to receive at his hands. A great many of the authorities were presented to the Master of the Rolls, all of which indicate the necessity of imposing terms. Mr. Hume offered in the Court below that, if their claim was admitted, it was not to affect the rights of creditors who had already proved against the personal estate. But the Master of the Rolls decided against admitting the claim, having regard to the lapse of time, the rights of the other creditors, and the circumstances that had taken place.

The case of *Leahy* v. *De Moleyns* (1), decided in 1895 by this Court, has an important bearing on this case. The judgment of the Court of Appeal was delivered by Lord Chancellor Walker, who stated the points of argument in the case with great clearness. "The main defence," he says, "however, is that plaintiffs elected to rely upon the security of their mortgage only, and that, knowing of the death of Richard Chute, they allowed his assets to be segregated and distributed without making any claim, even though, by the death of Richard Chute, a portion of their real security was lost." That is not unlike the scope of the argument of Mr. Matheson and Mr. Molony in the present case. But there the Lord Chancellor held that that defence was not, under the circumstances of the case, made out; and he pointed out the difference between that case and *Ridgway* v. *Newstead* (2), which

(1) [1896] 1 I. R. 206. (2) 3 De G. F. & J. 474.

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turned on its own special circumstances, and where the conduct of the mortgagees altered the rights and position of the legatees.

These two cases were both discussed before the Master of the Rolls; but the important case of *Re McMurdo* (1) was not mentioned. It is obviously a case of the greatest importance on this question. In that case, in the administration of an estate, a large claim had been put forward against the personal assets by mortgagees; that claim had been verified by affidavit, but was subsequently withdrawn; and, having been withdrawn, it was disallowed. Over eight years afterwards the mortgagees sought to reconsider their position, and to prove against the personal estate. Swinfen Eady, J., held that they were not entitled to do so; that they had elected to stand or fall by their security, and, if they fell, it was their own look out. The case then went to the Court of Appeal, composed of Romer, Vaughan Williams, and Stirling, L.JJ.; and they reversed the decision of Swinfen Eady, J., and held that, notwithstanding the withdrawal of the claim and the disallowance of the claim, the mortgagees were entitled, upon terms, to prove against the personal estate. The judgments, which have been furnished for the use of the Court, have been already referred to very largely. I shall read one passage only from the judgment of Romer, L.J. (2). He says: "Then if they are not prevented from asking for leave to prove on that ground, I next will consider whether their then determination not to prove because of what they then considered to be the value of their security was to be taken as against them as final and irrevocable, so that when they subsequently found that their security did not realize what they had hoped it would, and did not suffice nearly to pay their debt, they should be held debarred from all opportunity under that change of circumstances from coming in, and proving for the balance of their debt. I think that what then took place could not be held to so prevent them. To my mind it was a mere case of a secured creditor at the time resolving not to prove because at the time he valued his security as being equal to or greater than the amount of his debt; and, no doubt, at that time he probably did not

(1) 86 L. T. (N. S.) 553.

(2) The Lord Chancellor read this passage from the manuscript judgment. See *ante*, p. 10, footnote.

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contemplate that there would be any necessity at any time thereafter for his having to come and prove because of any possible change in the value of the security or in the amount it would realize. But that is a very different thing from saying that he must be thereby taken to have resolved and elected to never come in, and attempt to prove, even if it should turn out that, contrary to his anticipation, the property realized less than the amount of his debt. It seems to me you cannot, and ought not, to draw such a conclusion from his acts on that occasion." That is a decision of the utmost importance; it was not cited before the Master of the Rolls; and, in my opinion, it is an authority exactly in point; and there is no answer to that statement of the law by the Court of Appeal.

I am therefore of opinion that the judgment of the Master of the Rolls cannot be supported; and the only remaining question is as to the terms upon which the mortgagees should be allowed to come in. At the present I do not see any reason why these parties should not be allowed to prove subject to the terms offered by Mr. Hume in the Court below, namely, that, without prejudice to the payment of the creditors who have already proved against the personal estate, the appellants should be allowed to prove their debt. The appellants must, of course, pay the costs of the application in the Court below.

FITZGIBBON, L. J.:—

The hardship on Mr. Harrison, on which the Master of the Rolls rested his judgment in refusing the appellant's application, amounts to this, that he took up this suit, and went to all the trouble and expense to which he has been put, in the expectation of realizing something for himself, and that, if he had known that this mortgagee was going to prove against the personal estate, he would have seen that he could get nothing.

I think that a residuary legatee who takes up an administration suit cannot escape from the necessary consequence of his position. He represents the beneficial interest of a debtor, and he can take nothing until the demands against the assets are satisfied. Unless the inaction, or delay, or conduct of the mortgagee has given him an equity, by prejudicing some actual

right, or by affirmatively altering his position, Mr. Harrison cannot be better off than the parties were in *McMurdo's Case* (1). There is a distinction between following and getting back money which has been paid out, and allowing a creditor to claim, out of time, against assets not yet distributed. This was the vital point of our decision in *Leahy* v. *De Moleyns* (2), in which we could not apply *Ridgway* v. *Newstead* (3). If the right of the creditor has not been renounced, he may come in upon reasonable terms, so long as the estate is unadministered.

As to special terms, there certainly ought to be two :—1. Mr. Ronan concedes that the creditors who have already proved must have the same rights against the realized personalty as if it had been paid to them; that they should not be disappointed at the last moment in getting possession of money due to them, and perhaps driven to a tedious and costly administration of real estate on which the appellant already has a charge. 2. Mr. Henry Harrison has a strong claim to all the costs and expenses which he incurred in the suit in the expectation that there would be a residue, which expectation was based on the mortgagees not proving, and is only now disappointed by our admitting the proof.

The mortgagee must pay the costs of the application to the Court below, which was rendered necessary by his own delay, including Mr. Harrison's costs, and also those of Mr. Wilson's client; and though successful, he cannot justly throw his costs of the appeal either upon the other creditors or upon the residuary legatee; but, on the other hand, we cannot order him to pay the costs of the unsuccessful respondents. Accordingly, as in *McMurdo's Case* (1), all parties must abide their own costs of the appeal.

HOLMES, L. J. :—

This case, in the aspect it has now assumed, has been presented to this Court in a different way from that in which it was argued before the Master of the Rolls, who might have come to a different conclusion if he had heard the argument that has been addressed to us.

(1) 86 L. T. 553. (2) [1896] 1 I. R. 206. (3) 3 De G. F. & J. 474.

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A gentleman named Kirk had a mortgage on the real estate of the testator, which contained a covenant to pay by the mortgagor. Being under the impression, as most people are, that the specific charge would be sufficient to realize the amount of his mortgage debt, he did not prove against the personal estate at the outset, nor did he seek to do so until the debts had been ascertained, and until it was found that the personalty was in excess of the debts proved. It was, however, then discovered that the lands upon which the mortgage was charged were inadequate to discharge it in full. The mortgagee thereupon, before any money had been distributed, applied to the Court for liberty to prove against the personal estate. It is admitted—or at least the case was argued on the basis—that the estate is solvent, that is, that it will be sufficient to pay all demands, and that there will be something over for the residuary legatee and devisee. It would appear to me that, subject to the rights of the other creditors, it would be a matter of course to allow the applicant to prove as against the residuary legatee, because the latter can get nothing until the debts are paid. Our order will not affect any of the creditors who have already proved, or any costs that have been already incurred. It will only affect the interest of the residuary legatee, and the simple question seems to me to be whether the testator's estate is to pay his debts? Apart altogether from any cases that have been quoted, I think that no Court which administers equity or justice would prevent a creditor under such circumstances coming in to prove.

Solicitor for G. Kirk: *G. A. Howe.*
Solicitors for Henry Harrison: *V. B. Dillon & Son.*

R. D. M.

SYKES *v.* CARROLL.

M. R.
1902.

April 28
May 8

Will—Special power of appointment—Gift of property "over which I have disposing power"—Intention to exercise power.

A testator had by his marriage settlement power to appoint a rentcharge of £30, subject to the life interests therein of himself and his intended wife, amongst the children of the marriage, and in default of appointment his wife had a like power. He had no other power of appointment. The testator, by his will, devised and bequeathed to his executors all properties to which he might be entitled or was possessed of at the time of his death, or over which he had any disposing power, on trust to pay the income thereof to his wife for life, and after her death to his children, share and share alike.

There were three children of the marriage. The testator's wife survived him, and by her will devised and bequeathed the residue of the property belonging to her, or over which she had any power of appointment or disposition, to her daughter A. :—

Held, that there was no intention to exercise the power expressed in the will of the testator, and that the annuity passed under the will of his wife.

ORIGINATING SUMMONS.

By a settlement of October 28, 1863, executed on the occasion of the marriage of John Burgess and Essie Mackay, certain lands in the county of Donegal held in fee-farm were conveyed by William Mackay, father of Essie Mackay, to Alexander Crawford and William Thompson, in trust to receive out of the said lands the annual sum of £30 during the joint lives of John Burgess and Essie Mackay, and in case Essie Mackay should survive John Burgess to permit her to receive the said annual sum of £30 during her life, and after her death the said annual sum to go amongst the children of the marriage in such shares as John Burgess should by deed or will appoint, and failing such appointment in such shares as Essie Mackay should in like manner appoint, and failing such appointment amongst such children equally.

There were three children of the marriage, the plaintiff

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Annie Sykes, and the defendants Mary Carroll and Agnes J. Henderson.

John Burgess, by his will dated November 6th, 1876, bequeathed to his wife Essie Burgess all his furniture, linen, and other household goods which at the time of his death were in his house, and as to all other household goods, chattels, properties, securities for money, rights, and credits to which he might be entitled and was possessed of at the time of his death, or over which he had disposing power, he left, devised, and bequeathed the same to his executors in trust to collect all debts due to him, and to obtain the money due on the policies of his life, and to invest all sums arising from every source on such securities as they might deem best, and pay the annual interest, issues, and profits thereof to his wife for her life, for the support and maintenance of their children and herself, and their education; and on her death the testator left and bequeathed all the money and property above-mentioned to her children, share and share alike; and should any of them die under twenty-one years of age, he directed that the share of the child so dying should go amongst her surviving sisters. In case his wife should marry again, he directed his executors to pay her an annual sum of £50 during her life for her separate use, and apply the balance of the yearly interest and profits which might arise over and above the said annual sum of £50 to the support, maintenance, and education of her children till they came of age or married, and, subject to the payment of the said annual sum of £50 during his wife's life, he left and bequeathed all the said moneys, properties, goods, and chattels so placed in trust to his children, share and share alike; and should any of them die before attaining twenty-one years of age, he directed that the share of the child so dying should go equally amongst her surviving sisters. He appointed his wife and William Thompson and J. Joyce executors and trustees.

Essie Burgess survived John Burgess. By her will, dated April 21st, 1900, she bequeathed to her daughter Annie Sykes her diamond ring, and to John Thompson, her trustee, £25. As to all the residue of the property real or personal belonging to her, or over which she had any power of appointment or disposition, she gave, devised, bequeathed, and appointed the same to her daughter

Annie Sykes for her separate use, and appointed John Thompson her executor. Essie Burgess died in 1901, leaving the three children above-mentioned her surviving.

On January 27, 1902, a summons was taken out by Annie Sykes as a *cestui que trust* under the settlement of October 28, 1863, and will of Essie Burgess, to have it determined—1. Whether under the said settlement and will of Essie Burgess the plaintiff was entitled for her own use and benefit to receive out of the lands put in settlement the whole of the yearly sum of £30; 2. Or whether under the said settlement and will of John Burgess the said sum of £30, charged aforesaid on the said lands, was payable in the following proportions:—£10 per annum to the plaintiff, £10 per annum to the defendant Mary Carroll, and £10 per annum to the defendant Agnes J. Henderson.

John Thompson, the trustee, was also made a defendant.

Jefferson, for the plaintiff:—

There is no reference in the will of John Burgess to the power, nor to the property the subject of the power, nor any words expressing an intention to exercise the power. Besides, there is no evidence that the testator had not a general power of appointment. [He referred to *In re Swinburne* (1); *In re Richardson's Trusts* (2); *In re Cotton* (3).]

If the power to appoint the annuity was not exercised by the will of John Burgess, it was exercised by the will of Essie Burgess.

Longfield, for Mrs. Carroll and Mrs. Henderson:—

The words of the testator's will "or over which I have disposing power" are a sufficient indication of an intention to exercise any power the testator had. The word "power" is a term of art, and means power of appointment. His three daughters, who are the ultimate beneficiaries under his will, were the objects of the power. *In re Teape's Trusts* (4) and *In re*

(1) 27 Ch. D. 696.
(2) 17 L. R. Ir. 436.
(3) 40 Ch. D. 41.
(4) L. R. 16 Eq. 442.

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Swinburne (1) are in my favour, so also is *In re Milner* (2); *In re Richardson's Trusts* (3) was not approved of by Farwell, J., in *In re Mayhew* (4). The word "appoint" was used in the last three cases, but that is not necessary if "power" means power of appointment. There is no evidence to show whether the testator had any other power of appointment or not. It is admitted that if the annuity did not pass under the will of John Burgess it passed to the plaintiff under the will of Essie Burgess.

Jefferson, in reply :—

In *In re Mayhew* (4) there was evidence that there was no other power of appointment, and the word "appoint" was used.

The Master of the Rolls directed the case to stand, to ascertain if the testator had any other power of appointment. On May 5th the case was mentioned again, and an affidavit produced to show that the testator had no other power of appointment.

May 8.

THE MASTER OF THE ROLLS (after stating the facts, proceeded as follows):—

No question arises as to the will of Mrs. Burgess, for if the annuity was not appointed by her husband's will it passed under her will to the plaintiff only. Under the alleged appointment by the husband's will, or in default of any appointment, it would go to the three daughters equally. The question, therefore, is whether the will of John Burgess operated as a valid appointment of the annuity of £30.

Mr. Theobald thus states the general rule :—"In order to exercise a special power there must be a reference to the power, or to the property subject to the power, or an intention otherwise expressed in the will to exercise the power." Here there is no mention of the power, nor of the property subject to it; therefore the question must depend on the third branch of the rule.

The question in each case is what the testator intended. No one word, occurring by itself, can have any conclusive effect. Even the word "appoint," which is a term of art, has never been

(1) 27 Ch. D. 696.
(2) [1899] 1 Ch. 563.
(3) 17 L. R. Ir. 436.
(4) [1901] 1 Ch. 680.

held to have any magical operation so as to control and overpower a contrary intention ; that is, if the testator shows that he uses it, not in its strictly technical sense, but loosely, and as meaning no more than adding one further tautologous expression to the familiar words "give, devise, and bequeath," the technical sense will not be forced upon him against his wishes.

It is to be observed, however, that the word "appoint" certainly goes nearest to effectuating this undesirable end ; and that it does not occur in the will before me. In *Richardson's Trusts* (1) Chatterton, V.-C., held that the mere use of the word "appoint" in its context was not a sufficient indication of the intention to exercise a special power. That case is referred to by Farwell, J., in *In re Mayhew* (2), and apparently dissented from in so far as it could be understood as laying down a general rule applicable to all cases. I do not think that the Vice-Chancellor intended to formulate any such general *dictum* so as to exclude other considerations. He was dealing with the will before him, and, I think, with that alone. However that may be, *In re Mayhew* (2) was decided on the word "appoint," coupled with the fact that the gift was to objects of the power.

Farwell, J., there says :—"This case is very near the line ; but I have come to the conclusion that the limited power was exercised. I start with the fact that the gift is to the objects of the power. It is plain upon the authorities that a mere direction to pay debts out of the fund is not enough to negative an intention to exercise the power. In addition to this there is evidence that the testatrix had no other power. The evidence shows that the testatrix had one limited power and no other power at all. She uses the words—'I appoint, devise, and bequeath.' Now the word 'appoint' is a word of art, *prima facie* having reference to powers only. I do not of course say that if there were no other words of disposition, the word 'appoint' in itself would not pass all the testatrix's property. But here I have the three words, 'appoint, devise. and bequeath,' and the word 'appoint' in this collocation necessarily refers to a power. I therefore read the will as if the testatrix had said, 'I devise and bequeath, and in exercise of every power enabling me in this behalf I appoint . . .'

(1) 17 L. R. Ir. 436. (2 [1899] 1 Ch. 563.

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In the present case the words 'devise and bequeath' would be sufficient in themselves to exercise a general power; so that I am only following the general rule of giving effect, so far as possible, to every word used by the testator, if I say that the word 'appoint' must necessarily refer to a special power." He then refers to *In re Richardson's Trusts* (1), and reads from the judgment of the Vice-Chancellor, and says:—"This *dictum* should probably be read with reference to the will before Chatterton, V.-C. If it was intended as a general *dictum*, so as to be applicable to the will before me, I respectfully dissent from it."

The same may be said as to *In re Milner* (2), though in that case the words "any disposing power" also occur. Stirling, J., there says: "The rule applicable to cases of this sort is thus stated by Pearson, J., in *Von Brockdorff* v. *Malcolm* (3), in a passage cited with approval by North, J., in *In re Cotton* (4): 'The simple question is whether I can find in the will itself such an indication of an intention to exercise the power as that I ought to hold that the power has been exercised. It is a question of intention, and intention only.'" Stirling, J., continues:—"In applying a rule of this kind little assistance is to be got from wills differing in form and expression. I may state, however, that where a will is found containing a general expression of intention to execute any disposing power to which the testator may be entitled, the Court has repeatedly refused to infer the contrary intention from such circumstances as a direction to pay debts, or funeral expenses, or legacies, or bequests in favour of persons not objects of the power."

In the present case the words are not "*any* disposing power," but property "over which I have disposing power"—very similar, no doubt, but not identical. Mr. Longfield argued that the word "power" is also a term of art; and, if used in that sense, means "power to appoint," and thus involves the word appoint (though the latter is unexpressed); and that so the case of *In re Milner* (2) is undistinguishable from the present.

I am not prepared to go so far. When both power and appointment are expressed the case is clearer for the imputation of the technical sense than where one alone occurs; and in *Cooke* v.

(1) 17 L. R. Ir. 442.
(2) [1899] 1 Ch. 563.
(3) 30 Ch. D. 179.
(4) 40 Ch. D. 44.

Cunliffe (1) the words are identical with those before me, and were held not to be an exercise of a special power to appoint: —"All the residue of my personal estate and all my real estate over which I have any disposing power I give, devise, and bequeath to my eldest son Philip Denis Cooke, his heirs, or assigns." Lord Campbell, C.J., there says:—"It has long been settled that the donee in exercising a power must show an intention to exercise it, either by directly referring to the power or by referring to the subject-matter of it. In the present case there is no sufficient reference to the power, and I think there is no sufficient reference to the subject-matter. The testator uses the words, 'all my real estate over which I have any disposing power I give to my eldest son, his heirs, or assigns.' He had, at the time he used those words, estates of his own, family estates coming from his own ancestors, and on which he resided; part of them were under settlement and part were at his absolute disposal; and every word in this will is satisfied by supposing that he referred to those patrimonial estates over which he had complete disposing power, and not to the Pulestone estate, over which he had a limited power of appointment. The reference to the subject-matter of a power must be unequivocal to have the effect of making a devise be an execution of it." Patteson and Erle, JJ., agreed.

That case was decided a considerable time since, in 1851; but it will be observed that it proceeded upon principles recognised as correct and coercive at the present day.

In *In re Cotton* (2) the will was held not to be an exercise of a special power of appointment, though the language was far stronger for holding the opposite view than that before me. North, J., there says:—"The testatrix when she made the will proceeded in this way: 'I give, devise, and appoint all my said aforesaid estate whatsoever and wheresoever, and all other the real and personal estate of or to which I shall at my death be seised or possessed of, or over which I shall at my death have power of appointment or disposition by will, to my trustees.' I confess that in the absence of the authority cited, *In re Swinburne* (3), I should have doubted whether that was sufficient to show

(1) 17 Q. B. 245. (2) 40 Ch. D. 41. (3) 27 Ch. D. 696.

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an intention to exercise the power." "It is clear therefore" (he adds) "that here the testatrix is contemplating that the whole of the trust estate she is dealing with will be sold by the trustees of her will at a time at which the settled property could not be held and applied by them to the maintenance of the daughter. This shows that she was not intending to exercise the power contained in the settlement."

The cases are not all easily reconciled, and I do not attempt that task. In one respect they all agree, viz., that in each case the intention is to be ascertained and effectuated.

Let me then see what this testator, John Burgess, meant. He was a solicitor. His will was made in 1871, just eight years after the marriage settlement; he cannot therefore have forgotten the settlement. He brought nothing into settlement himself. The annuity of £30 per annum was charged on lands that never belonged to him, but were the property of William Mackay, his wife's father. The immediate interest which John Burgess takes (in terms) in this annuity is limited to him and his wife for joint lives, with remainder to his wife for life if she survived him, and after her death amongst the children of the marriage in such shares as he should by deed or will appoint, and in default of such appointment amongst such children in such shares as his wife should in like manner appoint, and in default of appointment to the children in equal shares. Had he meant to exercise this power, I should have expected to find some precise reference to it, and should certainly not have supposed that he would describe the annuity as his own property. He had no power to appoint, save subject to his wife's life estate; and the wife was not an object of the power at all. And before turning to the general context let us see how the words "disposing power" (not "*a*" disposing power, or even "*any*" disposing power) are used. They follow the words "... to which I may be entitled *and* am possessed of at the time of my death, or over which I have disposing power." Grammatically the words "entitled to and possessed of" are connected, so that having written them the testator might deem it right to enlarge their scope, so as in terms to apply to property, &c., to which he might be entitled, but of which he might not be possessed at his death, and that so he may have used

the phrase in the text as sufficient in a popular but quite intelligible way to cover money on loan, &c. This construction would render the words used neither tautologous nor even unnecessary.

Passing from this comparatively small point, however, I find the testator leaves his "properties" (a word slid in, as it were, among others, all *prima facie* confined to pure personal estate) to his executors upon trust, to pay the income thereof to his wife for life for the support and maintenance of herself and children and their education, and on her death to her children, share and share alike.

Thus, I am asked to hold that his wife being entitled to this annuity of £30 independently of him, he intended to give her that same annuity as part of her provision under his will. It is true that William Thompson was a trustee of the settlement, and also an executor of the will; but there was another trustee and there were other executors. Under which instrument did the testator think they were to act?

The annuity, of course, was not his property after his death, and could not be made liable for his debts since there were children of the marriage. But if he supposed that it was his "property," so that he could leave it to his executors, he must have supposed that it would in their hands be his assets. No doubt, even an express charge of debts is not *per se* conclusive against the intention of dealing with a fund which is subject to a special power, *Cowx* v. *Foster* (1), but it is a circumstance to be weighed with others.

The provisions for the wife in the event of her marrying again seems to me to be conclusive as to the question of intention. All that in that event she is to get is £50 per annum, "to be paid during her natural life into her own hands," for her separate use, free from marital control. This either includes the £30 under the settlement or is an addition to it. If the latter, there is no repugnancy or illegality in the disposition; but in that case the £30 cannot have been intended to pass under the will. If, however, the testator meant the £50 to include the £30, then he was leaving her out of his own assets (sworn at £7000) only £20 per annum, and besides was affecting illegally to alter the

(1) 1 J. & H. 30.

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SYKES v. CARROLL.

character and incidents of her own annuity under her settlement, and to appoint to a person not an object of any power whatever.

I do not think the testator had any intention to deal with anything under his will except what was his; and there are no words in it to compel me to hold that without intending it he has done so. In my opinion the annuity goes, not under any appointment in his will, but as appointed by his surviving wife. I do not doubt that he deliberately left it for her to deal with, as it was really hers far more than his, and it was plainly his idea that this was so.

I should add that I allowed evidence to be given which satisfies me that Mr. Burgess had no other power of appointment under any other instrument. This may be taken as established, and may be important should the case go further.

Solicitor for the plaintiff: *W. G. Armstrong.*
Solicitors for the defendants: *Corker & Levis.*

W. L.

V.-C. 1902.

Nov. 5.

MANSFIELD *v.* MANSFIELD.

(1902. No. 668.)

Practice—Originating summons—Jurisdiction—Question between annuitant and devisee of land as to personal liability of devisee to pay annuity—Order LV., Rule 4.

A testator devised and bequeathed freeholds and leaseholds to F., with a condition for, or subject to, payment of annuities to E. and M. E. and M. took out an originating summons, claiming a declaration that F. was personally liable to pay the annuities and an order for payment by him accordingly:—

Held, that the case did not come within Order LV., Rule 4.

ADJOURNED SUMMONS.

Francis Mansfield made his will, dated the 1st January, 1875, and having thereby left and devised to his son, Francis Stewart

Mansfield, certain freehold and leasehold hereditaments, and certain chattels, proceeded:—"And I leave and bequeath all the aforesaid properties and all their appurtenances, that they shall go to the use and benefit of the said Francis Stewart Mansfield, on the express condition that all my just debts and incumbrances affecting said lands, and due by me, including the sum of £6000 late Irish currrency, being the amount of my dearly loved wife's fortune, and borrowed by me from the trustees of my marriage settlement, and applied to the payment of debts and charges affecting the aforesaid estates, and also to the payment of £50 per annum to my daughter, Eliza Mansfield, and a like sum of £50 to my daughter, Mary Mansfield, during their respective lives"; and he appointed his three sons, Francis Stewart Mansfield, James Charles Henry Mansfield, and Edmund Christopher Mansfield, his executors.

The testator died on the 19th February, 1884.

Probate was granted on the 18th July, 1884, to Francis Stewart Mansfield and Edmund Christopher Mansfield, power being reserved as to the third executor.

This was an originating summons taken out by Eliza Mansfield and Mary Mansfield as plaintiffs against Francis Stewart Mansfield and Edmund Christopher Mansfield as defendants, asking—1. That it might be declared that Francis Stewart Mansfield was personally liable to pay the annuities. 2. That an account might be directed as to how much was due on foot of the annuities, and that the said defendant might be ordered to pay same within a day to be named. 3. In the alternative, and if necessary, that the real and personal estate of Francis Mansfield might be administered.

An affidavit of the plaintiffs stated that on the death of the testator the defendant Francis Stewart Mansfield entered into possession of the property devised and bequeathed to him, and that the annuities were largely in arrear.

C. A. O'Connor, K.C. (with him *Henry G. Richards*), for the plaintiffs.

Serjeant Campion, K.C. (with him *H. Morgan Byrne*), for the

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defendant Francis Stewart Mansfield, made a preliminary objection :—

There is no jurisdiction to entertain this application ; the case does not come within Order LV., Rule 4 ; the question here is not one arising in the administration of the estate, and the Rule does not apply : *In re Newman's Trusts* (1).

O'Connor, K.C. :—

The Court may in its discretion decline to decide the question on summons, but it is a question arising in the administration of the estate ; it affects the devisee who has gone into possession under the gift in the will, and the point for decision is whether he takes subject to a personal liability for the annuities. This comes within Rule 4. In *M'Mahon* v. *M'Mahon* (2) a similar question was decided, and an order for payment made on an originating summons.

Serjeant Campion, K.C.:—

M'Mahon v. *M'Mahon* (2) was a different case. There the will contained a direction that the testator's son by name should pay his sister the sum in question, and there was no way of providing for it except by the personal order. Moreover, in that case the son did not appear, the question of jurisdiction was not raised, and *In re Newman's Trusts* (1) was not brought to the attention of the Court.

C. W. R. Brady, for the defendant Edmund Christopher Mansfield.

THE VICE-CHANCELLOR held that the case did not come within Order LV., Rule 4, and ordered it to be struck out with costs.

Solicitor for the plaintiffs : *Thomas C. Franks.*

Solicitors for the defendants : *Mallins* and *Knox & Gilliland.*

D. M'C. M.

(1) 29 L. R. Ir. 9. (2) [1901] 1 I. R. 489.

In re BRISCOE and SMITH.

(1902. No. 581.)

M. R.
1902.
July 7.

Practice—Taxation of costs—Solicitors' Remuneration Act, 1881—*General Order*, 1884, *Sch. I., Part I.—Transfer of mortgage—Costs of transferor's solicitor.*

The solicitor for the transferor of a mortgage is to be remunerated for showing any title required and for approving of the transfer under the old system, as altered by Schedule II. of the General Order, 1884.

Summons to Review Taxation.

This was an application on behalf of FitzHenry A. Smith to review the taxation of a bill of costs furnished by Richard Lett, solicitor for Mrs. Annie Constance Briscoe, in connexion with the transfer of a mortgage for £2000 from Mrs. Briscoe to Colonel Charles Pepper and Edward Hamilton Woods.

The facts of the case are as follows:—FitzHenry A. Smith was the owner of certain lands in the county of Meath subject to a mortgage for £2000 vested in Mrs. Briscoe. She served notice to call in the mortgage, and employed Richard Lett, solicitor, for the purpose of obtaining payment. Colonel Charles Pepper and Edward Hamilton Woods agreed to take a transfer of the mortgage. Messrs. Montgomery & Chaytor were solicitors for FitzHenry A. Smith, and acted for him and for Colonel Charles Pepper and Edward Hamilton Woods; they investigated Mrs. Briscoe's title to the mortgage, and the transfer was duly completed. Richard Lett furnished a bill of costs to FitzHenry A. Smith, the first items of which were as follows:—

1. Solicitor's fee, under the Solicitors' Remuneration Act, 1881, for all duties in connexion with the transfer by the transferor and her husband (who was required to join therein) of the above recited mortgage, reading over old and deducing new title of transferors, including the execution of the said transfer by the parties, and the acknowledgment thereof by the said Annie

M. R. 1902.

In re Briscoe and Smith.

Constance Briscoe as a married woman, consideration £2000 :— For the first £1000, £20 ; like second £1000, £15.

The Taxing Master, on the taxation of the bill of costs, allowed these items. Messrs. Montgomery & Chaytor, on behalf of Fitz-Henry A. Smith, objected to these allowances, on the ground that the claimants (Mr. and Mrs. Briscoe) were neither mortgagors nor mortgagees within the meaning of the Solicitors' Remuneration Act, 1881, and that the solicitor did not perform the work required to be done by Schedule I., Part I., of the General Order of 1884, made under the said Act. The Taxing Master adhered to his ruling, and this summons was taken out.

D. G. Chaytor, in support of the summons :—

The Taxing Master allowed the items on the ground that the work required by the schedule had been done, but did not deal with the objection that the case did not come within the scale. The fee allowed, 40*s.* per £100 for the first £1000, and 30*s.* per £100 for the second £1000, is that provided by the scale for "vendor's solicitor for all charges, including charges for negotiations by solicitor connected with a sale of property by private contract or by auction, including preparation of contract, and conditions of sale, deducing title, and furnishing necessary searches, and perusing and completing conveyance."

But a transfer of a mortgage is not a sale of property within the meaning of the scale. The same fee is provided in the case of a mortgagee's solicitor, but there is nothing in the schedule as to transfers of mortgages. Rule 10 of the General Order deals with transfers of mortgages; it does not apply here, but it shows that a case of transfer of mortgage should be provided for by rule. The opinion of the Incorporated Law Society that the solicitor for a transferor of a mortgage should be paid for showing any title required and approving of the assignment of the mortgage under the old system as allowed by Schedule II. of the General Order is correct and applies here (1).

(1) Incorporated Law Society's Calendar, 1902, p. 361. It was also argued that even if the scale applied, the work required to be done by a vendor's solicitor had not been done ; but, as no decision was given on this point, the facts and arguments are omitted.—[Rep.].

Jefferson, for Mrs. Briscoe :—

She is a vendor of property within the words of the Order; the mortgage was property which she could sell.

THE MASTER OF THE ROLLS :—

In my opinion the case does not come within Schedule I., Part I., of the General Order made under the Solicitors' Remuneration Act. The mortgage in question became vested in Mrs. Briscoe, who was a sister of the owner of the estate, and she wanted to be paid off. Messrs. Montgomery & Chaytor found persons willing to advance the money, and they took a transfer of the mortgage in favour of their clients. The Taxing Master has come to the conclusion that the scale should be applied. It is not quite clear from his report how he arrives at this conclusion; but in my opinion the scale fee does not apply to the present case. The words are, "Vendor's solicitor:—For all charges, including charges for negotiation by solicitor, connected with a sale of property by private contract or by auction, including preparation of contract and conditions of sale, deducing title, and furnishing necessary searches, and perusing and completing conveyance." An assignment of a mortgage may in one sense be called a sale of property; but the scale fee does not apply to sales of all sorts of property, *e.g.* of a policy of insurance. The matter is made plainer by referring to the amount of the remuneration provided by the scale. The fee for a mortgagor's solicitor is 30*s.* per £100 for the first £1000, whereas the fee for the vendor's solicitor is 40*s.* per £100 for the first £1000; therefore, if the scale applied, the original mortgagor's solicitor's fee would be less than the fee of the transferor's solicitor, which would be absurd. I think, therefore, that the case does not come within the rule. Therefore, the solicitor is entitled as on a *quantum meruit*, and the costs will have to be taxed according to the old system as altered by Schedule II.

Solicitors for FitzHenry A. Smith: *Montgomery & Chaytor.*
Solicitor for Mrs. Briscoe: *Richard Lett.*

W. L.

V.-C.
1902.
July 24, 30.

WALLACE *v.* ROE.

(1902. No. 439.)

Statute of Frauds—Sale of land—Memorandum in writing signed by purchaser —Signature of vendor's agent as "witness"—Binding agreement.

Certain lands were sold to a purchaser by private treaty, through an auctioneer authorized to act as agent for the vendor, subject to conditions originally prepared for a sale by public auction, which had proved abortive. The purchaser signed the memorandum in writing attached thereto, acknowledging that he had purchased from the vendor the premises mentioned in the annexed particulars for the sum of £800, subject to the conditions of sale thereunto annexed, and that he had paid the deposit, and that he agreed to pay the balance on or before the date mentioned in the conditions of sale. The memorandum was also signed by the auctioneer as "witness." The vendor refused to complete:—

Held, that the vendor was bound by the signature of the auctioneer, although merely purporting to sign as "witness," he having been duly authorized to sell by the vendor.

In this case the statement of claim averred that by an agreement made on the 28th March, 1902, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to purchase from the defendant, subject to certain conditions, the lands of Middlemount, situate in the barony of Clonenagh and Queen's County, containing 195 acres, held by the defendant for a judicial term at the yearly rent of £92 10*s.*, for the sum of £800.

The agreement above referred to was in the following terms:—

"I do hereby acknowledge that I have this day purchased from Robert C. Roe, Esquire, the vendor, by private treaty, the premises mentioned in the annexed particulars for the sum of £800, subject to the conditions of sale hereunto annexed, and have paid into the hands of Mr. Peter Roe, the auctioneer, the sum of £200 as a deposit, in part payment of the purchase-money. And I hereby agree to pay the remaining sum of £600 unto the vendor on or before the date mentioned in said conditions of sale.

"As witness my hand this 28th day of March, 1902.

"Purchase-money, £800
Deposit, . . 200
£600

"James Wallace. [*Stamp.*]

"*Witness*—Peter Roe."

The agreement was originally prepared for a sale by public auction, which proved abortive, and was the same in form as the present except that the words "by private treaty" were substituted for "by public auction."

It was provided by the conditions of sale, among other things, that the purchaser should immediately after the sale pay to the auctioneer one-fourth of the purchase-money, and sign an agreement to complete the purchase according to the conditions.

The plaintiff, as purchaser, duly paid to Peter Roe, the defendant's auctioneer, on the 28th March aforesaid, the sum of £200, being one-fourth of the purchase-money, and signed the agreement, which was also signed by the auctioneer, Peter Roe, as "witness."

The conditions of sale further provided that the vendor should within fourteen days after the day of sale furnish to the purchaser an abstract of title, together with a copy of the conditions of sale, which the defendant failed to do.

The case made on behalf of the defendant was that the auctioneer was not authorized to act as his agent at the sale, and that the alleged agreement was not signed by the defendant or any person thereunto lawfully authorized, and that the Statute of Frauds was not complied with.

The plaintiff claimed specific performance.

Fleming, K.C., and *W. G. Gibson*, for the plaintiff:—

We submit on the facts that the auctioneer was authorized by the defendant to sell at a fixed price. Although a principal or his agent sign merely as witness, he may be bound if the signature amount to an acknowledgment of the existence of the agreement: Dart's Vendors and Purchasers, vol. 1, p. 271. But where a person whose formal signature would not have bound the vendor merely attested the execution of the agreement by the purchaser, such a signature is insufficient. Thus, a signature by an auctioneer's clerk will not bind a vendor, as the clerk is only an agent of an agent: *Gosbell* v. *Archer* (1). In *Dyas* v. *Stafford* (2) the decision went on the ground that there was no concluded agreement in writing, but the principles already alluded to were recognised as law.

(1) 2 Ad. & E. 500. (2) 9 L. R. Ir. 520.

V.-C. 1902.

WALLACE v. ROE.

Matheson, K.C., and *Dudley White*, for the defendant, contended on the facts that there was not sufficiently clear evidence that the auctioneer was authorized by the defendant to sell at a fixed price; and as to the question whether there was sufficient compliance with the Statute of Frauds, they relied on *Gosbell* v. *Archer* (1) as supporting the contention that there was not.

At the close of the arguments, the Vice-Chancellor intimated that he was satisfied on the facts, that the auctioneer had authority from the vendor to sell, but reserved to a later day his decision on the question, whether there was a sufficient memorandum in writing to satisfy the requirements of the Statute of Frauds.

Subsequently his Lordship delivered the following judgment:—

July 30.

THE VICE-CHANCELLOR:—

I have already expressed my opinion on the question of fact in this case, and held that there was a contract between these parties for the sale of the lands of Middlemount, but I reserved my decision on the question, whether there was a sufficient contract in writing duly signed to take this case out of the operation of the Statute of Frauds. The writing, on which this question arose, was in the form of an acknowledgment by the purchaser, that he had on the day of its date purchased from the vendor by private treaty the premises, mentioned in the annexed particulars of sale, for the sum of £800, subject to the conditions of sale thereto annexed, and had paid into the hands of the auctioneer the sum of £200 as a deposit in part payment of the purchase-money, and he thereby agreed to pay the remaining sum of £600 to the vendor on or before the date mentioned in said conditions of sale. Under this was written, "As witness my hand this 28th day of March, 1902." This was signed by the purchaser, James Wallace. This document also bears the words, "witness, Peter Roe," written at foot. This Peter Roe was an auctioneer, who had been employed by the defendant to sell these lands for him by an auction, which had proved abortive, and was afterwards employed by the defendant to dispose of the

(1) 2 Ad. & E. 500.

lands by private contract. I have held that he was so employed by the defendant, and that he had entered into a contract, as agent for the defendant, with the plaintiff to sell to him for the £800, as mentioned in the document I have above stated. The question therefore is, whether the signature of the vendor's agent is a sufficient authentication or admission of the contract for sale; whether it is, within the words of the statute, some memorandum or note thereof in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. There can be no doubt, in my opinion, that here there is a memorandum or at least a note in writing of the contract for sale. It is an express statement in writing of the contract, specifying the names of the vendor and purchaser, and the terms of the contract, the price to be paid, and the mode of payment, and that such price had been in part paid to a person named, whom I hold to have been acting in this matter as the agent of the vendor, and it also contains a promise by the purchaser to pay to the vendor the balance of the purchase-money. The conditions of sale are referred to and incorporated into this document. Then it is signed by the person who had been acting as the vendor's agent in the transaction. If he had not put in the word "witness," there could, in my opinion, have been no doubt as to its being a signature within the statute. I cannot hold that its meaning is to be thus confined. The document required no attestation. What was he to be witness of? I can only give it the meaning of an authentication of the whole contract, as stated in the paper that he signed. I do not think that the otherwise unmeaning introduction of the word "witness" is, under the facts of this case, sufficient to confine the effect of the signature accompanying it, and in fact to render the signature inoperative.

I shall therefore give judgment for the plaintiff, and decree specific performance by the defendant with costs.

Solicitor for the plaintiff: *Rolleston.*
Solicitor for the defendant: *Turpin.*

J. MAC M.

V.-C.
1902.

Oct. 31.
Nov. 5, 26.

SKINNER *v.* GUMBLETON.

(1902. No. 776.)

Will—Construction—Devise of land in strict settlement—Gift of personalty on similar trusts—Ultimate gift to "right heirs and assigns"—Persona designata.

A testator devised his real estate in trust for his eldest son for life, with remainders over in tail, remainder to his right heirs, and bequeathed his personalty on similar trusts, with an ultimate remainder to his "right heirs and assigns":—

Held, that the personalty under the ultimate gift passed to the heir-at-law of the testator as *persona designata*, and not to his next-of-kin.

ADJOURNED SUMMONS.

By his will, dated the 16th March, 1857, the Rev. George Gumbleton, of Belgrave, in the county of Cork, devised to trustees and the survivor of them, his heirs, executors, administrators, and assigns, all the share and interest in certain lands therein specified, and also certain sums of money therein mentioned, amounting to £19,455 16*s.* 10½*d.*, together with all other moneys which he might die possessed of, upon trust, subject to a life interest in certain of the lands and a certain annuity to his wife, and to certain legacies, as to the lands, to the use of his eldest son William Edward Gumbleton for his life, with remainder to the first and other sons of the said William Edward Gumbleton in tail male, and for default of such issue to the use of his second son for life, with remainder to the first and other sons of his second son in tail male, and for default of such issue male, with remainder to the daughters of the said William Edward Gumbleton and the heirs of their respective bodies issuing, to be divided amongst them, if more than one, in equal shares as tenants in common, and for default of such issue female, with like remainder to the daughters of his second son, and for default of such issue male or female of his said sons to the use of a nephew John Henry Gumbleton for life, with remainder to the issue male of his said nephew in tail male; and for default of such issue male

of his said nephew, with remainder to his right heirs for evermore. As regards the residue of the personalty, the testator declared the trusts in the following terms, viz.:—"Upon trust to permit my said eldest son the said William Edward Gumbleton and his assigns to receive and take the yearly interest, dividends, and profits thereof for his life, and from and after his decease to permit and suffer the person and persons, to whom in succession and for the time being the said hereditaments and premises are by me herein limited, to receive and take the same according and as far as the nature thereof and the law will permit; and in default of such issue male or female of my said sons W. E. Gumbleton and George Gumbleton, and the issue male of said John Henry Gumbleton, then upon trust for my right heirs and assigns."

Testator appointed his eldest son William E. Gumbleton his residuary legatee.

The testator died on the 29th October, 1860, and probate was granted to his wife Frances Anne Gumbleton, his sole executrix, on the 6th December, 1860.

The testator left him surviving his widow Frances Anne Gumbleton, his eldest son and heir-at-law William Edward Gumbleton, and his second son George Gumbleton.

Frances Anne Gumbleton, the widow, died on the 4th August, 1867, having by her will, dated the 6th July, 1861, bequeathed all she might die possessed of to her son George Gumbleton. The said George Gumbleton married Jessie Ramsay Skinner on the 18th July, 1889, and died without issue on the 25th May, 1894, having by his will, dated 18th July, 1889, bequeathed all his real and personal estate to his widow absolutely, and appointed her executor.

Jessie Ramsay Gumbleton died on the 12th October, 1901, having by her will, dated 12th June, 1899, bequeathed to Thomas Skinner, the plaintiff, among other property, all her share in the personal estate of the Rev. George Gumbleton, the testator in this matter.

John Henry Gumbleton died long prior to the present proceedings unmarried and without issue.

The testator's eldest son William Edward Gumbleton was still alive, but was of advanced years and unmarried.

V.-C. 1902.

SKINNER v. GUMBLETON.

The present summons was taken out by the plaintiff Thomas Skinner, and the principal question raised was whether, in the events which had happened, the residue of the personalty passed to the testator's next-of-kin or heir-at-law under the will.

O'Connor, K.C., and *Pim*, for the plaintiff:—

In the case of the realty no difficulty arises; the realty is put in strict settlement with an ultimate remainder to testator's right heirs, and "heirs" must mean the heir-at-law. Although the personalty is settled in a similar way, the ultimate trust is for testator's "right heirs and assigns." The use of a different expression and of the plural shows that in the event of the ultimate gift taking effect more persons than one were contemplated, and consequently the testator must have intended his next-of-kin taking, as he was dealing with personalty. The personalty could not pass to the heir-at-law unless he was marked out as a *persona designata*: *Newton's Trusts* (1); *Atkinson* v. *L'Estrange* (2); *Steevens' Trusts* (3); *Gittings* v. *M'Dermott* (4). It is said that if the words "right heirs and assigns" do not mean the heir-at-law, the personalty falls under the residuary clause, but it is plain from the use of these words that the testator intended to dispose of it other than under the residuary clause.

H. D. Conner, K.C., and *H. C. Bowen*, for the heir-at-law:—

The words "right heirs and assigns" will pass the personalty to the heir-at-law if it be shown that he is the *persona designata* on the face of the will: Hawkins on Wills, page 91; *De Beauvoir* v. *De Beauvoir* (5). Here the realty was first put in strict settlement; and the personalty was also settled in like manner, and there is nothing in the will to show that the testator intended to separate the realty and personalty. *Boydell* v. *Golightly* (6) is a case in point. The addition of the word "assigns" has no force: *Brookman* v. *Smith* (7). "Heirs" has the same force as "heir": *Mounsey* v. *Blamire* (8). In all the cases cited for the plaintiff there

(1) L. R. 4 Eq. 171.
(2) 15 L. R. Ir. 340.
(3) L. R. 15 Eq. 110.
(4) 2 My. & K. 69.
(5) 3 H. L. Cas. 524.
(6) 14 Simon, 327.
(7) L. R. 6 Ex. 291.
(8) 4 Russ. 384.

was a context controlling the meaning of the words "heirs and assigns."

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SKINNER v. GUMBLETON.

Even if the ordinary limitations applicable to personalty prevail, the personalty will go to the heir-at-law as residuary legatee. The appointment of a residuary legatee shows an intention to exclude the next-of-kin.

THE VICE-CHANCELLOR:—

Nov. 26.

The will of the Rev. George Gumbleton, on which the question before me arises, deals with several parcels of real estate, and also a large amount of personal property, all of which he proceeds in the first place to dispose of together. He devised and bequeathed all these to trustees therein named and the survivor of them, his heirs, executors, administrators, and assigns, and all others, the moneys and properties he might die possessed of, to the uses and upon the trusts, &c., therein mentioned and declared; and after making certain additional and substitutional provisions for his wife and certain of his children, he devised his real estate to his sons successively in tail male in strict settlement, with remainders to their daughters also in strict settlement, and in default of such issue male or female of his said sons, to the use of his nephew John Henry Gumbleton also in strict settlement in tail male, according to the usual course and strict limitations in family settlements, in the same manner as the same hereditaments were by said will limited to his son William Edward Gumbleton, and his first and other sons in tail male, and for default of such issue with remainder to the testator's right heirs for evermore. He then proceeds to declare the trusts of the residue of his personal estate, charged with payment of his debts, &c., upon trust to permit his eldest son William Edward Gumbleton to receive the income thereof for his life, and after his death to permit and suffer the person and persons, to whom in succession and for the time being the said hereditaments were by him thereinbefore limited, to receive the same as far as the nature thereof and the law would permit, and in default of such issue male or female of his sons William Edward Gumbleton and George Gumbleton, and the issue male of said John H. Gumbleton, then upon trust for his own right

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heirs and assigns, and he appointed his eldest son his residuary legatee.

All these devises and bequests prior to the ultimate gifts to his own right heirs and assigns failed to take effect. The question thus arises who is or are entitled to his personal estate, whether it went to his heirs or to his next-of-kin? As the first question put in the summons is expressed, it is, whether in the events specified, the gift of the personal estate for the right heirs and assigns of the testator was a valid gift. This question is not the true question to be decided. I see no ground for holding it was invalid, so this question must be answered in the affirmative. If I am right in this, there is no reason for considering the second question, as it does not arise. But the real question is the third, namely, whether the property comprised in it passed, in the events which have happened, as a gift to the heir-at-law or to the next-of-kin of the testator.

In my opinion, upon the true construction of the will, the subject of the gift passed to the person who shall be ascertained to have been the heir-at-law of the testator at his death. Such heir could not take by descent, it is true, but he may take, and here I think he did take, as *persona designata* by the words "my right heirs and assigns." This is the natural meaning of the word "heirs," and it cannot, even though applied to personal estate only, be otherwise construed without a clear context, showing it would be contrary to the intention of the testator. The rule on this subject is laid down clearly and authoritatively in *De Beauvoir* v. *De Beauvoir* (1), and there are many cases, some being of the highest authority, to the same effect. So far from there being any such context here, I think the whole scope of the will tends in the opposite direction. It was, as it appears to me, a desire of the testator to keep all his property together, save the subject of some legacies, as far as the rules of law permit, and it would be quite opposed to this if his personal estate, which was considerable, was to go to his next-of-kin, and his real estate to go to whoever may be found his heir-at-law.

On these grounds I hold that the personal estate in question

(1) 3 H. L. Cas. 524.

went on testator's death to the person who shall be found to have been his heir-at-law.

The costs should come out of the personal estate.

Solicitors for the plaintiff: *D. & T. Fitzgerald.*

Solicitors for the defendant: *William Guest Lane & Co.*

J. MAC M.

V.-C. 1902.

SKINNER *v.* GUMBLETON.

IN THE MATTER OF THE ESTATE OF WILLIAM D'ARCY IRVINE, A VENDOR OF LAND.

Meredith, J. 1902.

May 2, 3. Oct. 27.

Landlord and tenant—Land Purchase Acts—Sale of indemnifying lands—Objection by owner of indemnified lands.

The lands of A were sold in the Landed Estates Court, with the liability of indemnifying the lands of B from a perpetual annuity affecting both. The indemnity was then sufficient. The owner of A proposed to sell to his tenants under the Land Purchase Acts, and the owners of portion of B objected on the ground that the interest on the purchase-money would not be sufficient to meet the annuity:—

Held, by Meredith, J., that the sales should be proceeded with.

APPEAL from an order of Mr. Commissioner Lynch, dated the 18th February, 1902, refusing to stay the proceedings in this matter, under the circumstances stated below, and which appeal was grounded on the following questions of law:—(1) That the vendor had no such interest in the lands as would entitle him to carry out the sales; (2) that the vendor was not entitled to sell the lands without (*a*) the concurrence of William Hurst and Edward Mitchell, the appellants, and the other owners of the indemnified lands, or (*b*) making provision for the redemption of the entire of the rentcharge; and (3) that the vendors could not give a good title to the lands free from the rights subsisting in the several owners of the indemnified lands under the deeds creating the indemnities. A similar appeal was brought by Gerard A. Bird under similar circumstances.

By a Landed Estates Court conveyance of the 30th July, 1873, Judge Flanagan granted to George Hurst the lands of Coolegrane and Currin, situate in the barony of Magerastephena

Meredith, J. 1902. *In re* IRVINE'S ESTATE.

and county of Fermanagh, containing 322 acres, to hold for ever, subject to the tenancies referred to in the schedule, and also subject, in conjunction with other lands (which were the lands in the originating statement herein) therein described, containing 972 acres, to a perpetual rentcharge or annual sum of £500 late currency per annum (equivalent to £461 10*s.* 9*d.* sterling), created by an indenture dated the 14th October, 1826, and made between George Marcus D'Arcy Irvine of the first part, George Hassard of the second part, and John Irvine of the third part, and confirmed by an indenture bearing date the 28th March, 1850, and made between the Rev. Henry Stewart of the first part, the Rev. Edward Hassard and John Hassard of the second part, and William D'Arcy and Edward D'Arcy of the third part; but as to the lands thereby granted indemnified against the said rentcharge or annual sum, and all costs and expenses occasioned by the non-payment thereof, by the other lands which had been sold by the Court charged therewith in full exoneration of all other lands liable thereto. Since the date of the Landed Estates Court conveyance no claim on foot of the rentcharge of £461 10*s.* 9*d.* had ever been made against the lands comprised therein. At the date of the Landed Estates Court conveyance there was a balance of £269 10*s.* out of the indemnifying lands after payment of the rentcharge, and at the date of the filing of the originating statement the balance was £53 5*s.* It appeared from the affidavit of Mr. Maude, the agent, that there were twenty-nine tenants on the estate, four of whom had their rents fixed for a second statutory term, nine for a first statutory term, and sixteen were tenants from year to year.

The first intimation which William Hurst and Edward Mitchell, the trustees under the will of Rev. Thomas Hurst, in whom the grantee's interest under the Landed Estates Court conveyance was vested, received of the intended sale of the indemnifying land was by a notice, dated the 9th January, 1902, by an examiner to the Land Commission, stating the filing of the originating statement, and that it was estimated that, after providing for the redemption of the quit rents and annuities in lieu of tithe rentcharge payable in respect of the lands in the originating statement, and for the costs of the sales and other proceedings

thereunder, there would remain a surplus of in or about £9200 guaranteed land stock, producing an annual income of £253, which, together with the sum of £26, the annual rent of one holding not yet sold, would form the entire security for the payment of the perpetual rentcharge, leaving a deficit of in or about £182 10*s.* 9*d.* per annum, which would have to be provided out of the indemnified lands; and giving notice that any person objecting to the completion of the sales, on the grounds that the prices were insufficient or for any other reason whatever, should file an affidavit stating the grounds of his objection, and make such application as he might be advised to make to Mr. Commissioner Lynch. William Hurst and Edward Mitchell, and also Gerard A. Bird, whose predecessor in title purchased in the Landed Estates Court other lands also indemnified, accordingly applied to Mr. Commissioner Lynch on the 18th of February, 1892, for an order that all proceedings should be stayed on the ground that the vendor had no interest in the lands affected by the originating statement, and that it would be inequitable to proceed with the sales under the circumstances. Mr. Commissioner Lynch refused to stay the proceedings, and from that order the present appeal was taken.

Conner, K.C., for Gerard A. Bird; and *Pringle*, for William Hurst and Edward Mitchell:—

The power of redemption of the rentcharge can only be exercised in such manner as shall appear equitable, under sect. 31 (3) of the Land Law (Ireland) Act, 1896, which means equitable to all the parties interested in the rentcharge or subject to it. We are interested in it and subject to it; if the proposed sales are carried out we shall lose the benefit of the indemnity, which at present is sufficient. The Legislature never intended to throw a liability on us. [MEREDITH, J.: Would not that prevent the owner ever selling his land?] Yes. Ross, J., has held in *In re Bolton's Estate* (1) that where the value of the superior interests is so great that their redemption would swallow up all that could be obtained by a sale to the tenants he had no fee-simple to sell, and that the 40th section did not apply. The rentcharge cannot be satisfied,

(1) [1898] 1 I. R. 401.

Meredith, J. 1902. *In re* Irvine's Estate.

under section 31 (1), unless the owner of it is paid off: *In re Owens' Estate* (*No.* 3) (1); Maxwell on Statutes, p. 249. The obligation which a person undertakes himself should not be defeated. Even before the passing of the Act of 1896 redemption was only made on the grounds of expediency: *In re Pentland's Estate* (2).

Wakely, K.C., and *Walker*, for the owner:—

The question is whether a person who is the owner of a property entitled to an indemnity against an annuity charged on his and other property has a right to prevent the sale of that property. We say he has not. Here the lands are incumbered, and the incumbrancers insist on a sale, and the owner has no ulterior object. It cannot be said that the parties who object to the sales going on are in a better position than ordinary incumbrancers. The object of the Land Purchase code is stated by Lord Ashbourne, C., in *Pentland's Estate* (2) to be "to facilitate the operations connected with sales to tenants of their holdings" (p. 651). At first the consent of an incumbrancer to a sale to tenants in the matter of the retention of a guarantee deposit was necessary. See the judgment of FitzGibbon, L.J., in *In re Colthurst's Estate* (3); but sect. 23 of the Purchase of Land (Ireland) Act, 1891, does away with this. But the appellants here are only qualified incumbrancers. The opposition here is not from the owner of the rentcharge. How can it be said that the value of the rentcharge is greater than the value of the lands themselves? In *Thompson's Estate* (4) the question was whether the entire of the fee-farm rent should be redeemed, and not whether the lands should or should not be sold at all. The object of the Act of 1896 is stated by Walker, L.J., in *Owens' Estate* (*No.* 3) (1), to be "to get rid of insolvent estates and charges on such" (p. 168); and here we ask you to carry out that policy. Holmes, L.J. (p. 177), points out the care taken by the Legislature in providing machinery for carrying out the cardinal object of the section, which, we say, is the compulsory redemption of superior interests. Further (at p. 176), when stating that the redemption, or satisfaction, is to be

(1) [1900] 1 I. R. 151.
(2) 22 L. R. Ir. 649.
(3) 20 L. R. Ir. at p. 470.
(4) [1901] 1 I. R. 392.

made out of the money properly applicable thereto, says:—"It may be there is no such money"; and Walker, L.J. (at p. 168) says:—"The purchase-money, so far as it exists, is made distributable." Even if there is no money to meet the redemption of the superior interests, the sales must, nevertheless, be carried out, and the balance wiped out as being of no value. *Bolton's Estate* (1) was decided before *Owens' Estate* (*No.* 3) (2), and was a case under the 40th section, where an offer from an outsider could be considered; here the sale is under the Land Commission, where the tenants are the only possible purchasers. If the objectors are right the lands can never be sold. We have got the best price possible. It must be borne in mind that the objection is not raised by the owners of the rentcharge, but by persons who took their chance of the value of the lands rising or falling.

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Conner, K.C., in reply:—

The object of the owner is to put a liability on us. Is that equitable? He has no interest himself in the lands, and the result of his succeeding here would be to facilitate him in selling another estate which is for sale in the Land Judge's Court. He could apply to Ross, J., to apportion the rentcharge and redeem the apportioned part, but he wants to avoid the costs of that proceeding. He has no fee-simple to offer the tenants, which is necessary; see Palles, C.B., in *Owens' Estate* (*No.* 1) (3). In *Owens' Estate* (*No.* 3) (2), Holmes, L.J., points out that it is no doubt a hardship that a person—*i.e.* an owner of a superior interest—should be obliged to sell property which belongs to him, but continues, "It is not to be considered an injustice when means are supplied for ensuring him a proper price" (p. 173). Here the amount of the redemption money could not be called a proper price.

MEREDITH, J.:—

Having given this difficult case my best consideration, I have arrived at the conclusion that the order of Mr. Commissioner Lynch was substantially right and should be affirmed. The net

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(1) [1898] 1 I. R. 401. (2) [1900] 1 I. R. 151.
(3) [1897] 1 I. R. at p. 239.

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point to be decided is whether it is equitable to exercise, in this particular case, the powers of apportionment and redemption given to the Land Commission by section 10 of the Purchase of Land (Ireland) Act, 1885, and sections 15 and 16 of the Land Law (Ireland) Act, 1887, as extended by section 31 of the Land Law (Ireland) Act, 1896. It is not disputed that the Land Commission have jurisdiction to exercise those powers; but the appellants contend that on the facts and figures of this case it would not be equitable to exercise them, and they rely upon the words contained in the 3rd sub-section of section 31 "in such manner as shall appear equitable." Briefly stated, the contention of the appellants is that at present the rents and profits of the estate for sale in this matter are sufficient for the payment of the perpetual rentcharge of £461 10*s.* 9*d.*, which this estate is primarily liable to bear, in indemnification of other estates, including *inter alia* lands owned by the vendor and lands owned by the appellants. If the proposed sales are carried out, a serious deficit (which is estimated at about £182 10*s.* 9*d.* per annum) will have to be made good out of the hitherto indemnified lands. Now if there were a trace of bad faith on the part of the vendor, a suggestion of collusion between him and his tenants, or a hint of insufficient prices, I should hesitate long before I adopted the view of Mr. Commissioner Lynch; but the affidavit of Mr. Maude satisfies me that the best possible prices have been obtained, and that everything has been done that could be done to sell the estate to advantage. Am I then to declare that a landlord, who is qualified and entitled under the Land Purchase Acts to sell to his tenants, must refrain from selling unless he can realize a price sufficient to redeem or satisfy in full the demands of all persons concerned directly or (as in the present case) indirectly in the "superior interests" affecting the land sold? I do not thus read the 31st section or the decision of the Court of Appeal in *Owens' Estate* (1). It often happens that someone is left out in the cold when the purchase-money of property sold under the Land Acts comes to be distributed. In some instances the landlord's margin (settled perhaps in strict settlement), in others the dowager's jointure or

(1) [1900] 1 I. R. 151.

younger children's portions, again in others the moneys advanced by prudent or imprudent mortgagees, may dwindle or disappear. But, speaking generally, the landlord is entitled to sell to his tenants, and to ask the Court to put in force, for the purposes of the sale, the powers of apportionment and redemption referred to in and extended to superior interests by section 31, sub-section (3) of the Land Act of 1896. Those powers are to be exercised "in such manner as shall appear equitable"; so the Act of Parliament directs, and we obey. Thus it seems to me that the conclusion of the whole matter depends upon the answer to the question, whether it would or would not be equitable, having regard to the particular facts of this particular case, that the powers in question should be exercised. I shall not pause to review all the facts, but bearing in mind that the estate now for sale was purchased in 1873 for £5000, subject and primarily liable to the payment of the perpetual annuity of £461 10*s.* 9*d.*, and that it is solely owing to the change of times that the interest represented by that £5000 has diminished almost to vanishing point, and further recollecting that the main burden of the deficit which must result from this sale will fall, not upon the appellants, but upon the vendor's own estate now for sale in the Court of Mr. Justice Ross—the vendor being interested in both cases in the same capacity, viz. as a trustee for sale—I fail to see why it should appear inequitable to exercise powers which are conferred by law, and which are necessary for effectuating the sales fairly and honestly arranged between the vendor and his tenants. The alternative is to leave matters as they are, and to let the parties continue in their present temporary uncertain and unsatisfactory condition, waiting, like Mr. Micawber, for something to turn up. I consider that the best possible terms of sale have been arranged, and that it is really for the benefit and advantage of all parties that the respective liabilities of the indemnified lands should be ascertained. A right of indemnity is not equivalent to a strict non-alienation clause. It applies to *corpus* as well as income; and Mr. Walker's argument, that a right to indemnity out of particular lands can never be of greater value than the lands themselves, remains unanswered, and, I think, unanswerable.

I will only add that I do not consider that my judgment in

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the present case conflicts in any degree with the decisions of Mr. Justice Ross in cases under the 40th section. In *Bolton's Estate* (1) Mr. Justice Ross declined to go through the farce of offering the estate for sale to the tenants when there was an outside purchaser ready and willing to give a price which could never be got from the tenants. In *Connolly's Estate* (2) the facts were entirely different from the facts in the present case. The superior interest was vested in Trinity College, and in Trinity College alone. Here the appellants constitute only a fraction of the persons interested in the superior interest. The respective clients of Mr. Conner and Mr. Pringle represent estates which will have to bear a proportion —a small proportion only—of the deficit. The vendor's own estate must bear the brunt of the deficiency.

Mr. Justice Ross decided upon the particular facts of the case before him, and I decide this case upon its own particular facts and circumstances.

Solicitors for the vendor: *Maunsell & Darley.*

Solicitors for the objectors: *Falls & Pringle, Bird & Riordan.*

W. C. S.

(1) [1898] 1 I. R. 401.

(2) 34 I. L. T. R. 171.

SETTLED LAND ACT AND GRAY.

STANDING *v.* GRAY.

(1902. No. 835.)

M. R.
1902.
Oct. 27.

Settled land—Tenant for life and remainderman—Power to charge inheritance—Improvements—Additions and alterations with a view to letting—Drainage—Hot water supply—Settled Land Acts, 1882 (45 & 46 *Vict. c.* 38), *s.* 25; 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s.* ii.

A was tenant for life under a will of house property, with remainder to B in fee. One of the houses having become vacant, A, in order to let it, but without consulting B, employed a contractor to put in a bath and hot water supply and a new system of drainage, with the result that the house was let at a higher rent. A died shortly afterwards. The contractor, who had taken out administration to A as a creditor, sought to have the cost of the works charged on the inheritance as being "improvements" authorized by the Settled Land Acts. There was no capital money arising under the Acts:—

Held, (1) assuming the works were "improvements" authorized by the Acts, that there was no power under the Acts to charge the cost of executing them on the inheritance; (2) that the new system of drainage was an "alteration in buildings reasonably necessary or proper to enable the same to be let," within the meaning of s. 13 (ii) of the Act of 1890.

Semble, that the bath and hot water supply were also within the same subsection.

SUMMONS. This was a summons brought by William Standing against John Trew Gray, and entitled in the matter of the estate situate at Belgrave-square, Monkstown, in the county of Dublin, settled by the will of Robert Gray, deceased, dated 16th July, 1870, and three codicils thereto, and in the matter of the Settled Land Acts, 1882 to 1890. The summons asked for a declaration that certain works carried out by Messrs. Phenix & Standing, of No. 10, Leinster-street, Dublin, contractors and engineers, on part of the settled land mentioned in the title thereof, were improvements authorized by the Settled Land Acts, 1882 to 1890, and that the contract entered into by the said Messrs. Phenix & Standing with the late Reverend Thomas Sill Gray, a tenant for

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life of the said settled land, for the carrying out of the said works, were binding on the settled land, and enforceable against the defendant as successor in title to the said Thomas Sill Gray, and accordingly that the sum of £75 17*s.* 8*d.*, being the amount due to the said Messrs. Phenix & Standing on foot of the said contract, was a charge on the fee and inheritance of the said settled land, and should be paid to the said Messrs. Phenix & Standing by the defendant, in whom the said fee and inheritance have vested on the death of the said Thomas Sill Gray.

The facts of the case are as follows:—Robert Gray was at the time of his death possessed of ten houses in Belgrave-square, Monkstown, in the county of Dublin, including the house No. 18, Belgrave-square. He held these houses in fee, subject to a fee-farm rent of £30, reserved by a fee-farm grant of the 6th April, 1864. By his will, dated 16th July, 1870, Robert Gray devised the said houses to his son Thomas Sill Gray for life, subject to the ground rent of £30 per annum, and upon his decease to his issue (if any) as he the said Thomas Sill Gray should appoint, and, in default of such issue, to his son John Trew Gray, the defendant, subject to such ground rent and to an annuity chargeable thereon, which he gave to such widow of the said Thomas Sill Gray as might survive him during her widowhood. The testator devised and bequeathed to his son John Trew Gray the remainder of his property at Belgrave-square and Belgrave-road, Monkstown, together with his house, called Temple Hill, Blackrock, and everything contained in and about it, subject to the ground rents. He appointed his sons Thomas Sill Gray and John Trew Gray his executors. Robert Gray died in the year 1871, and Thomas Sill Gray entered into receipt of the rents and profits of the said houses, and continued in such receipt until his death on 1st March, 1901. Thomas Sill Gray never had any child, and on his death the defendant entered into receipt of the rents and profits of the said houses. In June, 1901, the house No. 18, Belgrave-square, which had up to that time been let to a tenant, became vacant.

The plaintiff William Standing, who carried on the business of a contractor under the style of Phenix & Standing, was informed on or about 6th June, 1900, by Thomas Sill Gray that

the house was vacant, and would require to be done up before it could be let; and he suggested that it would be necessary to erect a bath and make a close inspection of the sanitary requirements of the house. The plaintiff inspected the premises, and found that the water-closet and sanitary arrangements were very old and of obsolete construction, and were in such a condition that it would be very difficult to relet the house unless they were wholly renewed. Thomas Sill Gray instructed him verbally to take down the old sanitary arrangements and to put up modern ones, and also to put up a bath and hot water apparatus. Up to that time the house had neither a bath nor hot water supply. The plaintiff accordingly supplied and fitted up in the house a reclining bath, and also a hot water boiler and cistern, with all the necessary pipes and fittings; he removed the old water-closet fittings, which were in a very bad condition, and supplied and erected a new hygienic pedestal water-closet with all the necessary fittings and connections. By the direction of Thomas Sill Gray the plaintiff examined the drains of the house and premises, and found that they were leaking badly, and were so defective as to be beyond repair. He reported this to Thomas Sill Gray, and was instructed verbally by him to take up all the old pipes on his premises, that is right out to the border of the public pathway, and to put down new pipes in their place, and the plaintiff accordingly had that done. All the above work was reasonably necessary and proper for the purpose of enabling the house to be relet, and was done for the purpose of such reletting, and owing to the work done the house was relet almost immediately at a higher rent than that paid by the former tenant. The plaintiff's account for the said work amounted to £75 17*s.* 8*d.* On 14th June, 1901, letters of administration of the personal estate of Thomas Sill Gray were granted to the plaintiff as a creditor. On 19th July, 1901, an order was made by the Vice-Chancellor in a suit brought by James Gibson & Son, creditors of Thomas Sill Gray, against the plaintiff as such administrator, for the administration of the personal estate of Thomas Sill Gray. In pursuance of this order the usual accounts and inquiries were taken and made at Chambers, and the Chief Clerk, by his certificate dated 27th March, 1902, certified that there was a sum of £316 7*s.* 7*d.*

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due to the firm of Phenix & Standing by the estate of Thomas Sill Gray. The above sum of £75 17*s.* 8*d.* formed portion of the said sum of £316 7*s.* 7*d.* It also appeared from the said Chief Clerk's certificate that the estate of Thomas Sill Gray was hopelessly insolvent. An application was made in July, 1902, on behalf of the plaintiff to the defendant for payment; but he declined to recognise any liability for the debts of his brother Thomas Sill Gray, with whose affairs he was unacquainted. This summons was taken out on 9th September, 1902.

Jonathan Pim, in support of the summons:—

The works done are improvements within the meaning of the Settled Land Acts, 1882 and 1890. "Drainage" is an authorized improvement under section 25 (i) of the Act of 1882, and has been held to include an improved system of drainage of a mansion-house: *In re Houghton Estate* (1). Section 13 (ii) of the Act of 1890 makes improvements authorized by the Act of 1882 to include "making an addition to or alteration in buildings reasonably necessary or proper to enable the same to be let." *In re Gaskell's Settled Estates* (2) is somewhat against the plaintiff's claim, as it was there held that inserting a warming apparatus in a house was not "an addition to or alteration in buildings," but the decisions on the sub-section are not uniform. In *In re Freake's Settlement* (3) Joyce, J., held that providing an electric light installation in a London house was an "addition." But in *In re Clarke's Settlement* (4) Buckley, J., declined to follow that case, and held that "additions" meant structural additions, and therefore that an electric lighting installation in a country house was not an "addition" within the sub-section. Here the pipes are incident to a supply of water for domestic consumption within the meaning of section 25 (xiii) of the Act of 1882, and the water-closets are "alterations" of the building within section 13 (ii) of the Act of 1890. Baths and drainage are necessary for a house nowadays, though formerly this might not have been so considered. At any rate, they are "reasonably necessary and proper alterations" to

(1) 30 Ch. D. 102.
(2) [1894] 1 Ch. 485.
(3) [1902] 1 Ch. 97.
(4) [1902] 2 Ch. 327.

make in a house to enable it to be let, and they resulted in the house being let, and at a higher rent.

It is not necessary for the tenant for life to have consulted the remainderman before he made the contract for the improvement, and the Court has power to charge the property with the cost of the improvements of which the defendant has the benefit. [He referred to section 31 of the Act of 1882, and section 15 of the Act of 1890, and to Wolstenholme and Brinton on the Conveyancing Acts, 8th Ed., p. 353.]

Harrison, K.C., for the defendant:—

There is no jurisdiction to charge these expenses on the settled land. There are no trustees, and there is no capital money. A prospective order will not be made authorizing trustees who have no capital money in hand to expend it when it comes into their hands: *In re Millard's Settled Estates* (1); *In re Marquis of Bristol's Settled Estates* (2). There is no power in the Settled Land Acts to create a charge on the settled land for improvements; the Acts only provide for payment of the expenses of improvements of a certain class out of a fund, viz. capital money: *In re Montague* (3). *In re Hurst* (4), decided by this Court, has been followed in England in *In re De Teissier's Settled Estates* (5).

Even if there was capital money here available to be spent on improvements, the works that have been done are not improvements within the sections referred to. A "supply of water" in section 25 (xiii) of the Act of 1882 means bringing water to a house in the country, and cannot include water pipes in a town house where there is a public water supply in the street. So also "drainage" in section 25 (i) cannot apply to connecting a town house with a public sewer. The cases cited show that the works done are not "additions" or "alterations" within section 13 (ii) of the Act of 1890, and structural alterations are not rebuilding within section 13 (iv) of that Act: *In re De Tessier's Settled Estates* (5). Section 31 of the Act of 1882 merely means that the tenant for life is the person to decide whether a contract is to be

(1) [1893] 3 Ch. 116.
(2) *Ib.* 161.
(3) [1897] 2 Ch. 8.
(4) 29 L. R. Ir. 219.
(5) [1893] 1 Ch. 153.

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entered into. Here the only contract made was between him and the contractor, and did not purport to bind, and did not bind, the settled land. No scheme was submitted to the defendant before the works were executed, and the plaintiff only seeks to charge the estate of the defendant with the cost of the works done when he cannot get paid out of the assets of the deceased tenant for life.

Pim, in reply :—

There is jurisdiction to authorize reimbursements of past payments made by the tenant for life : *In re Tucker's Settled Estates* (1). It is said that there must be capital money available to give the Court jurisdiction, and that it cannot sanction a mortgage of the settled lands to pay for improvements effected by the tenant for life. If there are no trustees and no capital money, there is no redress under the Acts for a tenant for life who has expended money on improvements, unless the Acts enable him to get a charge on the settled land for the money so expended.

THE MASTER OF THE ROLLS :—

The claim here is for £75 17*s.* 8*d.*, which it is sought to have charged on the fee and inheritance of the settled land. Mr. Standing has done the work ; the question is, who is to pay for it. The £75 17*s.* 8*d.* is not the whole of Mr. Standing's claim, which amounted to £316 7*s.* 7*d.*, as appears from the Chief Clerk's certificate in the administration suit of *Gibson* v. *Standing* in the Court of the Vice-Chancellor, and it was allowed in that suit. The estate of Mr. Thomas Sill Gray having proved insufficient to pay the whole amount, Mr. Standing now seeks to recover this £75 17*s.* 8*d* , by having it declared a charge on the estate belonging to the defendant John Trew Gray, of which estate the deceased Thomas Sill Gray was tenant for life—that is, Mr. Standing claims to have a charge against the estate of a person who knew nothing of the works which were being done upon the property, and did not sanction them in any way. The charge is claimed by virtue of a statutory enactment ; apart from that it could not be contended that Thomas Sill Gray, the tenant for

(1) [1895] 2 Ch. 468.

life, could charge the lands with the cost of these works. I disclaim the idea that this Court has any power, apart from contract or statute, to create a charge upon the estate of anyone, when that estate is not itself liable to any such charge. It is not alleged that the will of Robert Gray, under which Thomas Sill Gray became tenant for life of the property, gave him any such power. The contract for the works was one between Standing and Thomas Sill Gray. It was not even a contract entered into by the plaintiff under the belief that it in any way bound the lands themselves. I take it for granted that Standing knew nothing of the title. He acted on the retainer of Thomas Sill Gray, and looked to him for payment. That, however, does not alter his rights if the Act of Parliament charges the property of the defendant who was entitled in remainder; but it is a circumstance to be considered. The contract was only a personal contract between Standing and Thomas Sill Gray.

But it is said that by virtue of the provisions of the Settled Land Acts, 1882 and 1890, the plaintiff is entitled to have a charge put upon the inheritance for the amount of his claim. It would be impossible, in any event, to make an order as sought. The items would have to be carefully examined and an account taken. In the view, however, which I take, it does not come within the Settled Land Acts at all.

I need not go through the authorities which have been cited as to what particular works are authorized by the Acts. Mr. Pim referred to several cases as bearing on the question whether the works done, namely, putting up a bath and making a new system of drainage, were improvements within the Act. I am satisfied that the drainage was a reasonably suitable and proper work, and would come within the meaning of improvements in section 13 of the Act of 1890, namely, "additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." I could not, as at present advised, be a party to a decision that a new system of drainage substituted for one which was clearly insufficient was not an improvement within that Act, though I do not now decide this. As regards the bath, I do not think it comes within section 25 of the Act of 1882; but I should be

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slow to hold that it does not come within section 13 of the Act of 1890. It is not necessary, however, to decide that. The main ground on which I base my judgment is that, assuming that these were "improvements," the case does not come within the Acts at all.

As I have said, except under statute I have no authority to make the order sought for. Suppose the tenant for life had made these improvements to the house and died several years afterwards, would the Court have power to charge the inheritance with the cost of these improvements? In the present case the interval between the making of the improvements and the death of the tenant for life was short. But it is to be borne in mind that there are no trustees of this property, which is settled by common law limitations; and, secondly, that there is no capital money to be dealt with. Where there is capital money in the hands of trustees, its expenditure (if authorized) works no injustice, the successive estates contributing in proportion to their respective durations. Here the plaintiff asks to make the remainderman pay the whole cost. Mr. Pim says that is no matter, if there is land which can be charged. But does the case come within the Act of 1882, which is the ruling Act? Section 25 describes the "improvements authorized by the Act." As I said before, it is not in the view I take necessary to decide whether the particular works done were improvements; but how does the matter of improvements come to be mentioned in section 25? It is by reason of section 21, which provides that "capital money arising under this Act . . . shall, when received, be invested, or otherwise applied" in manner specified, and, *inter alia*, as mentioned in sub-sect. (iii), that is "in payment for any improvements authorized by this Act." In ascertaining what are "improvements authorized by this Act" we have to look to section 25, and that is how the question of improvements came into the section. There is no enactment that authorized improvements are (apart from section 21) chargeable upon the inheritance. Where there is capital money it may be so applied if proper steps are taken. That is all. Suppose the trustees of a settlement had £1000 settled on the same uses as the lands, it might be reasonable that they should apply the money in payment of improve-

ments. The cost would then fall in equitable proportion on the tenant for life and the remainderman. But here there is no capital money, and therefore section 21 does not apply. Two cases cited confirm my view on this point. In *In re Millard's Settled Estates* (1) the trustees of an estate had no capital money in their hands. The tenants for life applied to the Court for an order authorizing the trustees to apply £2100 out of capital moneys to come to their hands for the construction of roads and sewers on the estate. It was held by the Court of Appeal that a prospective order of the kind could not be made. In *In re Montague* (2) an application was made by trustees to raise money by mortgage to be applied in rebuilding old houses. The persons entitled in remainder were infants. It was not shown that the expenditure was necessary for the actual salvage of the property. The Court of Appeal held that it had no jurisdiction to make an order. I do not say that these cases absolutely decide that there is under no circumstances power to charge the inheritance where there is no existing capital money; but no case has been cited where it has been done when there was none. I am not going to make a precedent, being clearly of opinion that there is no jurisdiction to do so. Therefore the summons fails, and must be dismissed with costs, without prejudice to any application the applicant may be advised to make in the action in the Vice-Chancellor's Court. I may add that I intimate no opinion that a summons of this sort under the Settled Land Acts can be brought by a creditor of a tenant for life seeking to bind a remainderman when the creditor has no estate or interest in the lands. It is not necessary to decide that question; and I only mention it in order to prevent misconception hereafter.

Solicitors for the plaintiff: *A. & L. Goodbody.*
Solicitor for the defendant: *R. A. Howe.*

W. L.

(1) [1893] 3 Ch. 116. (2) [1897] 2 Ch. 8.

Appeal.
1901.

COWELL, Grantor; BUCHANAN, Grantee (1).

Dec. 12, 16. *Landlord and tenant—Redemption of Rent (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 57, *s.* 1)—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47, *s.* 7, *sub-sect.* 1)—Bona fide *occupation—Subletting—Crucial date at which* bona fide *occupation must exist.*

Section 7, sub-section 1 (*b*), of the Act of 1896, which provides that for the purpose of the Land Law Acts the tenant of a holding shall be deemed to be in *bona fide* occupation thereof, notwithstanding that part of the holding is, otherwise than in breach of the contract of tenancy or of a statutory condition, sublet to or in the occupation of another person, if, in the estimation of the Court, a part, not less than seven-eighths in value of the holding, remains in the *bona fide* occupation of the tenant, and if the subletting was made before the Act of 1887, or was in substitution for a letting existing at that date, applies to the case of a grantee under a fee-farm grant seeking to redeem his rent under the Redemption of Rent Act, 1891.

The *status* as to occupation of the grantee is to be ascertained at the date of his application; therefore, the *status* of a grantee who was in *bona fide* occupation of upwards of seven-eighths of the holding at the date of his application is sufficient, though less than that amount of the holding was in his occupation at the dates when the Acts of 1891 and 1896 respectively passed.

Nelson v. *Headfort* (18 L. R. Ir. 407) distinguished.

Appeal from an order of Mr. Justice Ross, sitting as Judicial Commissioner of the Irish Land Commission, dated the 18th June, 1901, whereby he affirmed an order of Mr. Commissioner Lynch, holding that the grantee was not entitled to redeem his rent under the Redemption of Rent Act, 1891.

The grantee served an originating notice, dated the 1st May, 1900, under the Act of 1891, applying to redeem his rent, or, in the alternative, for an order fixing the fair rent to be paid for the holding.

The grantee held under a fee-farm grant dated the 23rd May, 1867, made by Thomas Bailey, from whom the present landlord,

(1) Before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.

Sarah Buchanan, derived her title, to Christopher Buchanan, the appellant's father. The holding consisted of the lands of Gortatole, in the county of Fermanagh, described in the fee-farm grant as "now or lately in the possession or enjoyment of the said Thomas Bailey, and his under-tenants, the said Christopher Buchanan and William Patterson, and containing 329A. 0R. 9P." The portion in the possession of William Patterson, 69A. 3R. 9P., was held by him as tenant from year to year; he had held it for thirteen years prior to the fee-farm grant, and he continued on as tenant to the grantee for several years, his rent being originally £38, but subsequently reduced to a judicial rent of £29.

On two former occasions, once in the year 1891 and again after the passing of the Act of 1896, the grantee endeavoured to obtain the benefits of the Redemption of Rent Act, 1891. On both occasions his application was dismissed on the ground that he was not in *bona fide* occupation of his holding, having regard to Patterson's occupation of these sixty-nine acres, and also to the occupation of two other portions of the lands held under the fee-farm grant, containing together upwards of thirty-eight acres, by two under-tenants named Leonard, who paid to the grantee judicial rents for their holdings, amounting in all to £20 10*s.*: 30 L. R. Ir. 375; [1898] 2 I. R. 147, 153.

On the second occasion, when the grantee endeavoured to obtain the benefits of the Act of 1891 (viz. after the passing of the Act of 1896), he contended that his case came within section 7, sub-sect. 3, of the latter Act, and that the Court should under that sub-sect. treat the parts sublet to Patterson and the others as separate holdings, and fix a fair rent on the remainder of the property. But this contention did not prevail, and his application was dismissed ([1898] 2 I. R. 147, 153) by the Court of Appeal, affirming Mr. Justice Bewley.

After the order so made by the Court of Appeal, the grantee purchased the interest of William Patterson, and so acquired the actual occupation of more than seven-eighths of the entire holding; he then served a fresh originating notice seeking to redeem the rent, and the landlord gave his consent to the redemption; but Mr. Commissioner Lynch held that no part of section 7 of the Land Law Act of 1896 applied to the case, and dismissed the

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COWELL, *Grantor;* BUCHANAN, *Grantee.*

originating notice; this decision was affirmed by the order of Mr. Justice Ross, and from this order the present appeal was taken.

Ronan, K.C., Fetherstonhaugh, K.C., Healy, K.C., and *Morgan Byrne,* for the grantee (appellant).

The Solicitor-General (*J. H. Campbell, K.C.*), *The Right Hon. The Macdermot, K.C.,* and *A. C. Meredith,* for the grantor (respondent).

The arguments appear sufficiently from the judgments.

Dec. 16.

LORD ASHBOURNE, C.:—

This is an appeal from the decision of Mr. Justice Ross, sitting as Judicial Commissioner of the Land Commission, by which he affirmed the decision of Mr. Commissioner Lynch. The question raised is: Does a tenant seeking to redeem his rent under the Redemption of Rent Act, 1891, come within section 7, subsect. (1), of the Land Law Act of 1896? The landlord signified his consent in the prescribed manner to an application by the tenant to redeem his rent under the first clause of section 1 of the Redemption of Rent Act, qualifying such consent in accordance with the usual printed form by adding the proviso: "Provided that the lessee is entitled to redeem the same under the provisions of the said Act." The question so reserved now arises, and has been discussed before us: Is the consent of the landlord so signified to be inoperative by reason of the tenant not being competent to apply to redeem his rent?

Upon a previous occasion the rights of the present appellant and respondent under the Redemption of Rent Act were discussed in the Land Commission and also on appeal in this Court. Bewley, J., when *Cowell* v. *Buchanan* (1) came before him on a point raised under sub-section (3) of section 7 of the Act of 1896, expressed a clear opinion that sub-section (1) of that section applied to proceedings under the Redemption of Rent Act. When the decision of Bewley, J., was under appeal Lord Justice Walker declined to

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give an opinion which would preclude him from afterwards considering the question now raised; and Lord Justice Fitz Gibbon and I were careful to express no opinion on the matter with which we must now deal.

The Act of 1891 commences by saying that "where a person is in *bona fide* occupation of a holding" he shall, subject to the fulfilment of certain other conditions, be entitled to apply to redeem his rent. It lies therefore at the threshold of this case that we must ascertain what is the meaning of the words "*bona fide* occupation" in the Act of 1891. Up to a certain point there is no room for question as to the meaning of the words. They cannot be interpreted in an absolute sense. The Legislature must be taken as using them with the knowledge that they had already received judicial interpretation: *M'Carthy* v. *Swanton* (1), so that they must include the case of a tenant subletting part of his holding with his landlord's consent, in which case the tenant is to be deemed in occupation of the entire holding (section 57 of the Act of 1881). The words would also, prior to the Act of 1896, have included the case of a tenant having made a subletting which was, in the opinion of the Court, of a trivial character, in which case it was also provided (section 4 of the Act of 1887) that the tenant was to be deemed "to be in *bona fide* occupation of his holding." But section 4 of the Act of 1887 has been repealed by the Act of 1896; and in lieu thereof Parliament has enacted the more generous provisions of section 7, sub-section (1) of that Act. From this course of legislation one would naturally expect that the substituted provisions would extend for the benefit of every class of tenant in whose case the repealed section operated, and that the new definition of the meaning of "*bona fide* occupation," given in section 7, sub-section (1) of the Act of 1896, was intended to apply to the words wherever they occurred in the entire code of enactments, which are directed to be read and construed together.

The words of section 7, sub-section (1) of the Act of 1896 are important:—"For the purpose of the Land Law Acts the tenant of a holding shall be deemed to be in *bona fide*

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occupation thereof," notwithstanding certain contingencies which would under the previous law have disqualified him from obtaining the relief afforded by the land code. Is the Redemption of Rent Act a "Land Law Act" within the meaning of these words? I use no special method of interpretation when I refer to section 48 of the Act of 1896, and point out that the expression "Land Law Acts, unless the context otherwise requires," is to include the Redemption of Rent Act. No doubt it is also provided that the expression "Land Purchase Acts, unless the context otherwise requires," is to include the Redemption of Rent Act. But I can see nothing incompatible in its being read both as a Land Law Act and as a Land Purchase Act whenever the context renders it possible. I can see abundant reason for including the Act in both categories. It may be a Land Law Act for some purposes—for example, for the purpose of supplying the provisions substituted for the repealed section 4 of the Land Law Act of 1887. It may be a Land Purchase Act for many reasons which may be suggested. But whatever may be the reason that induced the Legislature to say that the expression "Land Law Acts" should include the Redemption of Rent Act, unless the context otherwise requires, it is our duty to carry out that direction. There is not a syllable in the context of the sub-section which we have to construe which requires that the expression "Land Law Acts" should not include the Redemption of Rent Act. I am therefore of opinion that the relief mentioned in section 7, sub-section (1) of the Act of 1896, is granted to a tenant applying to redeem his rent under the Redemption of Rent Act.

It is conceded that there is nothing in the facts or circumstances connected with Patterson's assignment of his sub-interest to the appellant to show that it is collusive. Mr. Commissioner Lynch expressly finds that it was a real transaction, and accordingly there is nothing in the facts or circumstances of the case to prevent the appellant obtaining the advantage of the sub-section except it be by reason of the second contention put forward by the respondent, that the appellant's *status* must be ascertained as of the date of the passing either of the Act of 1891 or of the Act of 1896.

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The second part of the respondent's argument was that admitting that the expression "Land Law Acts" in section 7 of the Act of 1896 included the Redemption of Rent Act, so as to extend the new provisions in relief of subletting to a tenant applying to redeem his rent, yet that the appellant here was not entitled to the benefit of these provisions because he did not fulfil the qualifying conditions at the crucial date, and this crucial date was said to be the date of the passing of the Act of 1891, or, at latest, the date of the passing of the Act of 1896. It was argued that this result followed logically from the use of the word "is" in the enumerations of the conditions which the tenant must fulfil, and *Nelson* v. *Headfort* (1) and *Gaffney* v. *Fetherstonhaugh* (2) were relied upon. Each of those cases, however, was decided on a section which excluded the holding from the benefit of the land code by reason of some incident in its character which it was held must be ascertained as of the passing of the Act containing the section. This principle does not apply to a disability attaching to a tenant from his own act. It has always been held that the *status* of the tenant was to be ascertained as of the date of his application.

I am therefore of opinion that the appellant is entitled to succeed, and the decision appealed from must be reversed.

FITZ GIBBON, L. J.:—

The real question is whether the grantee is entitled to the benefit of the Land Law Act, 1896, section 7 (1), and to "be deemed to be in *bona fide* occupation" of his holding, notwithstanding the sublettings still subsisting and that which has come to an end. If he gets this benefit it will confer on him only a provisional advantage, for he must still satisfy the Land Commission that his holding is within the Redemption of Rent Act, and that he holds it at "a full agricultural rent"; but the jurisdiction to decide these points is not in us. We can only declare that, upon the evidence, the provisions of the Land Law Act, 1896, section 7 (1), apply to the grantee and to the holding, discharge

(1) 18 L. R. Ir. 407. (2) [1900] 2 I. R. 417.

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the order appealed from, and the order of Mr. Commissioner Lynch, and remit the case to the Land Commission to proceed therein as justice may require; the grantee's costs of this appeal and of the proceedings before Ross, J., must be paid by the respondent, but all the costs of the proceedings before the Land Commission will be reserved for its decision.

Two distinct questions have been argued. The first is, whether the occupation, which the applicant for redemption of rent must have at the time of his application, is "*bona fide* occupation" as glossed by the Act of 1896, sect. 7 (1); this depends on whether an application under the Redemption of Rent Act, 1891, is an application "for the purpose of the Land Law Acts" within the meaning of that section; in other words, whether the Act of 1891 is one of the "Land Law Acts" mentioned in the Act of 1896, section 7 (1).

The second question is, whether the tenant has got rid of the disqualification to which he was formerly subjected by reason of the sublettings which he had made.

The first question is answered by the language of the Acts. "The Land Law Acts" are to be read together as one Act, and all the successive additions to the code are included in the interpretation clause in the Act of 1896, section 48 (1):—"In this Act, unless the context otherwise requires, the expression 'Land Law Acts' *means*" (amongst others) "the Redemption of Rent Ireland Act, 1891"; and "the expression 'Land Purchase Acts' also means" (amongst others) "the Redemption of Rent Ireland Act, 1891." Therefore the Act of 1891 is included in each of these terms wherever it occurs, unless the context otherwise requires.

The Act of 1891 declares itself to be both a "Land Law Act" and a "Land Purchase Act"; for, by section 3, it is to "be read and construed with the Land Law Acts, 1881 and 1887, and the Land Purchase Acts."

In operation it is primarily a Land Purchase Act; but it becomes a Land Law Act when the landlord does not consent to the redemption of the rent. In this case we cannot deal with it in one of these characters alone, but we cannot make it into two Acts.

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The foundation of the grantor's argument disappears when it is admitted that the case would be within the Act of 1896 if the sublettings had been made with the landlord's consent; for since the Act of 1881, section 57, notwithstanding any subletting by consent, the tenant *must* be "deemed for the purposes of this Act to be still in occupation of the holding." Under the Act of 1887, section 4, where the subletting was "of a trivial character," the tenant *might* "also be deemed in occupation."

The Act of 1896 repealed this provision, and by section 7 (1) attempted to define what was "trivial," by deeming the tenant "to be in *bona fide* occupation," "if in the estimation of the Court a part, not less than seven-eighths, or thereabouts, in value of the holding, remains in the *bona fide* occupation of the tenant."

The words "*bona fide* occupation," used in the Acts of 1881, 1887, 1891, and 1896—all which Acts are "Land Law Acts" to be read together—must receive the same interpretation in each Act, and must bear the meaning given to those words by the last addition to the code, the Act of 1896, section 7 (1). That meaning is satisfied by the tenant in this case now.

The same argument applies, if possible more clearly, as to "demesne," to the Act of 1896, section 5. The Act of 1881, by section 58, did "not apply to tenancies in *any* demesne land." This exclusion was *wholly repealed* by the Act of 1896; and section 5 (1) (*b*) (ii) (iii), and (2), became law instead. Therefore, unless the Act of 1896, section 5, as to "demesne," applies to the Redemption of Rent Act, 1891, there is now no subsisting enactment about "demesne" which can supply a subject for the words "a holding to which Part I. of the Land Law (Ireland) Act, 1881, applies" in the Act of 1891, section 1.

The question—What is "the crucial date"?—appears to me to be covered by decision. There are two sets of sections, one defining the *status* of the tenant, the other defining the character of the holding. Both must be satisfied to bring a case within the Land Law Acts. Since *M'Carthy* v. *Swanton* (1) it has always been held that the *status* of the tenant as to occupation is to be ascertained at the date of his application. But the holding

(1) 14 L. R. Ir. 365.

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must have the prescribed character when the Land Law Acts first applied to the land, except when otherwise expressly provided. *Nelson* v. *Headfort* (1) was a difficult case, because the inclusion of "townparks" depended upon the definition in the Act of 1881, section 58 (2), which made the residence of the occupier in the town part of the definition of the excluded holdings.

Our former decision in *Cowell* v. *Buchanan* (2) is now out of the way. The holding was then excluded because it was impossible to work section 7 (3), or to treat the sublet part as "a separate holding," or to give jurisdiction to the Court to determine "the proper proportion of the rent reserved by the demise," at which it should "be held during the continuance of the tenancy"; and we could not use the last clause of the sub-section to *create* a rent of the unsublet part of the holding, to be fixed as a fair rent and then redeemed, because the jurisdiction to fix a fair rent did not arise at all until the landlord had refused to consent to the redemption of the "full agricultural rent" at which the entire holding must be ascertained to be held before the Act of 1891 could apply. This difficulty is now removed, because the tenant is now to be "deemed to be in *bona fide* occupation" of the entire holding.

WALKER, L. J. :—

The question in this case is whether the 7th section of the Act of 1896 which, by means of the often used and now familiar words "deemed to be," extends the limits of *bona fide* occupation to a case where the tenant has sublet one-eighth or less of his holding, extends to and includes, for all purposes, the case of a tenant for whose benefit the Redemption of Rent Act, 1891, was passed: such a tenant in that Act, so far as material, is described as a person in *bona fide* occupation of a holding to which Part I. of the Land Law (Ireland) Act, 1881, applies.

There is no doubt that the applicant here has the long tenure

(1) 18 L. R. Ir. 407. (2) [1898] 2 I. R. 147.

which the Act mentions, and had it in 1891. If he had not, I think the decision in *Nelson* v. *Headfort* (1) would meet him and be applicable. The form of the application is to redeem his rent, which redemption is to be carried out by and through the Land Commission; and if the lessor or grantor does not consent to redemption, the lessee or grantee is to be deemed to have made the prescribed application under the Act of 1887 with a view to the fixing of a fair rent. When the grantee applied to redeem his rent he served an originating notice in the following form:—

"I, , the grantee, being in *bona fide* occupation of the above holding, which is held under a fee-farm grant dated the day of , and made between [*state accurately the parties*], at the yearly rent of £ , apply to the Court for an order for the redemption of the said rent, or, in the alternative, for an order fixing the fair rent to be hereafter paid for the said holding."

When the grantor consented to redemption of her rent she served a notice in the prescribed form, which is—

"I, the above-named vendor, do hereby consent as follows, viz.:—

"1. That the Court do make an order, pursuant to the provisions of the Redemption of Rent (Ireland) Act, 1891, for the redemption of the rent specified in the schedule hereto payable to me out of the holding therein described by , the grantee named in the originating notice, dated the day of , which has been served on me.

"2. That such redemption be carried into effect by means of a vesting order under the provisions of the Land Purchase Acts, vesting the holding in the grantee in fee-simple, freed and discharged from all superior interests, as defined by section 31 of the Land Law (Ireland) Act, 1896, and from all other charges and incumbrances.

"3. That interest upon the redemption price of the said rent at the rate of four per cent. per annum shall be payable in lieu of the rent from the date hereof, until such redemption price shall be paid into Court.

"Provided that if the grantee be not entitled to apply to redeem the said rent under the provisions of the Redemption of Rent (Ireland) Act, 1891, this consent shall be void."

The concluding proviso saved the question of jurisdiction of the Court which in this case was the point disputed.

(1) 18 L. R. Ir. 407.

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The material portion of the 7th section is the following [His Lordship read sub-sect. (1)].

It was assumed for the purposes of the case that the tenant was in *bona fide* occupation of not less than seven-eighths in value of the holding within the meaning of the section; but it was contended that, as by reason of the consent given, the rent was to be redeemed under the Land Purchase Acts the provisions of the Land Purchase Acts, as from the date of the consent, determined, for all purposes, the jurisdiction, and that there was no power to proceed under these Acts, inasmuch as the tenant was out of occupation of a portion which might be one-eighth or nearly so; and therefore jurisdiction to apply section 7 further was arrested. This seems to have been the ground of the decision of Mr. Commissioner Lynch and Judge Ross; but The Macdermot took wider ground, and contended that section 7 of the Act of 1896 did not apply at all to redemption of rent or any step in it.

In my opinion these views, both of them, are opposed not only to the plain language of the section and definitions in sections 48 and 50 of the Act, but also to the whole code of Land Law Acts, of which the Redemption of Rent Act is one, and of which code this 7th section is, so far as regards *bona fide* occupation, a mere expansion for the purposes of that code.

In order to understand the 7th section it is necessary to trace, as regards the subject of occupation, the history of the legislation from 1881, and also its history as regards the tenancies included in the legislation.

The Act of 1881 was passed for the benefit of occupying tenants, *i.e.* tenants actually occupying; but by sect. 57, when the tenant sublet with the consent of his landlord, he was, nevertheless, deemed to be in occupation. This imputed occupation runs through the whole code. So also the Act of 1881 only applied to yearly tenancies which were present tenancies. Existing leases were by section 21 saved from its operation; but at the expiration of such existing leases, or such of them as should expire within sixty years after the passing of the Act, the lessees if *bona fide* in occupation of their holdings were to be deemed to be tenants of present ordinary tenancies from year to year. Any subletting of an appreciable extent deprived the tenant of his rights unless he was

saved by section 57. It was decided in *M'Carthy* v. *Swanton* (1) that the 57th section as regards subletting with consent applied to the case of lessees within the 21st section, and that whether such subletting was before the Act or not.

The Act of 1887 first altered the law in favour of tenants both as regards the rights of leaseholders and the power of subletting without forfeiting their rights. It extended the rights of lessees under section 21 to leases of much longer tenure where the lessees were in *bona fide* occupation, and gave them an immediate right of application to fix a fair rent; and section 4 contained a considerable extension as to subletting. These extensions in both directions were in force when the Redemption of Rent Act was passed on the 5th August, 1891. The Purchase Act of 1885 had of course been passed in the meantime.

I think the question we have to decide will be solved by ascertaining the true construction of the Act of 1891 itself. The main object of the Act is to confer benefits on lessees, who, by reason of the duration of their tenure, were not reached by the Act of 1887, provided they held at a full agricultural rent.

On the very face of the 1st section it contemplates as a competent applicant a person who had already got all the Act of 1887 gave him, and accordingly such an occupier may apply.

What, then, is the relief such occupier gets? What he asks is to redeem his rent; and if consent to that will not be given by the lessor or grantor, the fixing of a fair rent. The money for the first object is procured from the Land Commission under the machinery of the Land Purchase Acts, and the fair rent is fixed under the Acts of 1881–1887; and for that reason the Act is, by section 3, read and construed with the Land Law (Ireland) Acts, 1881 and 1887, and the Land Purchase Acts.

If the argument for the respondent is sound, its logical result is that no one can redeem his rent who has made a trivial subletting, or who had made sublettings with consent; but those contentions were not pressed.

The position under the 7th section of the Act of 1896 is only a difference in degree of a minute kind. What was "trivial"

(1) 14 L. R. Ir. 365.

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under the Act of 1887 is stereotyped as one-eighth under the Act of 1896. The provision of the Act of 1887 is altogether repealed, and that in the 7th section takes its place as the last and final extension of the deeming to be "in *bona fide* occupation"; and this is "for the purpose of the Land Law Acts," the definition of which comprises the parts of the Acts of 1881 and 1887 applicable, and also expressly the Redemption of Rent Act, and the Redemption of Rent Act is also included in the definition of the Land Purchase Acts; for both are necessary to its complete working, just as the Redemption of Rent Act is, by section 3 of this Act, to be read and construed with the Land Law (Ireland) Acts, 1881 and 1887, and the Land Purchase Acts. The more the matter is examined the more clearly it appears that the words "for the purpose of the Land Law Acts the tenant of a holding shall be deemed to be in *bona fide* occupation thereof notwithstanding the subletting of one-eighth in value" import what the language conveys, viz. that such a tenant shall have a *status* to avail himself of all the provisions of the Redemption of Rent Act as well as the fair rent provisions of the Land Law Acts.

The second point, viz. that the person applying under the Act of 1891 should have been in *bona fide* occupation at the date of the passing of the Act of 1891 or 1896, seems to me opposed to the language used in the Acts, and admittedly to the decisions on the Land Acts in fair rent cases.

In *M'Carthy* v. *Swanton* (1) it was held that the *status* of the tenant is to be ascertained at the time of the application. The Chief Baron says, at page 377, referring to the 8th section of the Act of 1881: "'The tenant may apply.' When must he be the 'tenant' in order to apply? At the time of the application. What is necessary to constitute him a 'tenant,' assuming him to be entitled to land under a tenancy from year to year? He must be in occupation under the contract of tenancy. When must he be so in occupation? Clearly at the time of the application."

Kennedy v. *Essex* (2) was the case of a lessee who got rid of sublettings between the notice and the hearing.

Lord Ashbourne says: "Directing our attention now not

(1) 14 L. R. Ir. 365. (2) 28 L. R. Ir. 586.

to the date of the hearing but to the date of the originating notice, we find that admittedly the *status* of the tenant was not adequate to support it." The language of the Act is the same as in fair rent cases, "shall be entitled to apply." There the Court fixes what is the fair rent, considering all the circumstances of the case, holding, and district. So the Act of 1891 makes it necessary to consider the agricultural rent existing at the hearing, having regard to the circumstances of the case, holding, and district.

The cases of *Nelson* v. *Headfort* (1) and *Gaffney* v. *Fetherstonhaugh* (2) were relied on as authorities for fixing the *status* at the date of the passing of the Acts of 1891 or 1896. Either date would suit the contention of the respondent, but, in my opinion, those cases do not apply. They turned on the existence of some incident attached to the tenure which stamped its character and the character of the holding at a given time, not on occupation by the tenant under that tenure, which would be an accident as regards the subject-matter, but which prevents the tenant asserting his right to claim at the time his non-occupation exists. The definition of "present tenancy" has none of the elements of occupation as a necessity: that comes in separately as a qualification of the suing tenant.

I think we should follow the analogy borrowed from fair rent cases. Upon the whole, while accepting unreservedly the decision in *Cowell* v. *Buchanan* (3), even on the question of jurisdiction, I think this tenant has a right to make his application under the 7th section and pursue it to its end, subject, of course, to any question which may arise as to security or other matter arising under the Act of 1891, which does not affect the *status* of the tenant to make and carry on his application.

HOLMES, L. J.:—

I have experienced during this argument the difficulty which I always feel when a matter which I think perfectly plain seems to have puzzled other minds. In such cases I fear that I have overlooked or am unable to follow some aspects of the questions.

(1) 18 L. R. Ir. 407. (2) [1900] 2 I. R. 417. (3) [1898] 2 I. R. 147.

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The opening line of the first section of the Redemption of Rent (Ireland) Act, 1891, speaks of a person "in *bona fide* occupation of a holding." These words were in earlier portions of the Land Law code, as, for example, in the 21st section of the Act of 1881 and in the 1st section of the Act of 1887; and I think it clear that they ought to receive the same construction in each place. In the Act of 1881 they bear an artificial meaning, inasmuch as the tenant is held to be in *bona fide* occupation of any part of his holding which he has sublet with the consent of his landlord; and it is admitted that the same artificial meaning is to be given to them in the Act of 1891. The 7th section, sub-section 1, of the Act of 1896 introduces some further or special elements into the meaning to be given to the words "*bona fide* occupation," and it would be anomalous if this further modification were not to apply to all the statutes where the expression occurs. But the matter is put beyond doubt by the express enactment that the new conditions are to exist for the purpose of the Land Law Acts, one of which is declared by the glossary section to be the Redemption of Rent (Ireland) Act, 1891.

I frankly confess I do not understand the argument that the last-mentioned Act is partly a Land Law Act and partly a Land Purchase Act, and that in the one point of view "*bona fide* occupation" means one thing and in the other point of view it means another. The words only occur once, and they must have the same construction for all purposes.

The only foundation for the respondent's argument is to be found in some observations in this Court in the former case of *Cowell* v. *Buchanan* (1), which suggest that the Court was not adopting the views of Bewley, J., in their entirety.

I fully concur in the conclusion then arrived at, that sub-section 3 of the 7th section of the Act of 1896 is not to be incorporated with the Act of 1891. I do so because sub-section 3 is inapplicable to and incompatible with the whole scheme of the previous statute; but when I find sub-section 1 not only applicable to and compatible with it, but necessary for the purpose of keeping its construction in harmony with the rest of the code, I hold that it is to be incorporated.

(1) [1898] 2 I. R. 147.

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The second point relied on for the respondent can be dealt with in a few words.

There are two conditions of things dealt with in the Land Law Acts. The one is the *status* of the holding, the other the *status* of the tenant. The *status* of the holding must exist when the Act of 1881 or some amending Act came into operation. This was the subject of consideration in *Nelson* v. *Headfort* (1) and *Gaffney* v. *Fetherstonhaugh* (2). The *status* of the tenant is to be ascertained when he makes his application. The Land Law Acts have always been construed on this principle; and there is no good reason for refusing to apply it to the 1st section of the Redemption of Rent Act.

Solicitors for the appellant: *Falls & Pringle.*
Solicitors for the respondent: *O'Keeffe & Lynch.*

G. Y. D.

GEDDIS *v.* SEMPLE.

(1901. No. 850.)

V.-C.
1902.
April 23, 24.

Appeal.
Nov. 14.

Charity—Mortmain Act (7 & 8 *Vict. c.* 97)*—Devise of land—Secret trust—Tenants in common—Death of testator within three months—Validity of bequest.*

A testator devised certain houses, and also a legacy of £600 charged on the remainder of his property, which comprised landed property, to three persons absolutely, as tenants in common, coupled with a secret trust for charitable purposes. One of the legatees at the time the will was made was informed of the trust, the other two had no knowledge of it until after the death of the testator. The testator died within three months after making his will:—

Held, by Chatterton, V.-C., that the bequest of the three houses failed, and also the legacy of £600 so far as same was payable out of the real estate or chattels real of the testator.

Held, by the Court of Appeal (varying the order of the Vice-Chancellor), that the bequest of the one-third of the property to the trustee, who was aware of the trust, was invalid, but that the other two-thirds went absolutely to the other two devisees.

(1) 18 L. R. Ir. 407. (2) [1900] 2 I. R. 417.

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GEDDIS v. SEMPLE.

By his will, dated the 23rd November, 1899, James Withers, of Comber, in the county of Down, devised to the defendants Rev. Robert James Semple, James S. Steele, and James F. Shean in equal shares as tenants in common absolutely three dwelling-houses and premises situate in Castle-street, Comber, in the county of Down, and save as aforesaid he bequeathed all his real chattel real and personal estate to the executors and trustees of his will, the Rev. Robert Semple, James M'Cartan, and Mary M'Millan, upon trust to convert into money such parts of the trust premises as should not consist of money, and, among other things, in trust thereout to pay a legacy of £600 to the said Rev. Robert James Semple, James S. Steele, and James F. Shean in equal shares as tenants in common. The testator died on December 15th, 1899.

It was proved by the parol evidence that on the 22nd November, 1899, Alexander Stewart, a solicitor's clerk, saw the testator for the purpose of taking his instructions for the will. The Rev. Robert Semple was present; and by the will, as drafted, the testator devised the house property to the trustees and executors of his will to be held in trust to pay the rents to the clergyman for the time being of the Second Comber Presbyterian Church, and to invest £600 in Government stock and pay the dividends to the clergyman for the time being of the aforesaid church. The testator said he thought the bequest would be void, so far as it consisted of land, if he died within three months from the date of the will, that he had seen a case in the newspapers to that effect, and asked Stewart to make certain that the bequest would go to the church. Stewart said that he was not certain, and that he would like to consult his principals. They then left. On the following day, the 23rd November, Stewart returned, having in the meanwhile consulted with his master Mr. Graham. The Rev. Robert Semple was present at the interview. Stewart explained that if the testator died within three months from the date of the will any charitable legacy would be void so far as it consisted of lands, and that there would be danger of leaving the property on a secret trust, or in trust for charitable purposes. It was then agreed to leave the property to three people absolutely; and Stewart explained the effect of that to the testator. The testator said he wanted three good men to accomplish that

object; and he mentioned Dr. Steele, his medical attendant, as one. Mr. Semple mentioned a Mr. M'Millan; but the testator objected to him, and chose Mr. Shean. Finally, the will was drawn up in the above form, with Semple, Shean, and Steele as the three devisees of this portion of the property; but neither Steele nor Shean knew of this bequest till after the testator's death. When the contents of the will were communicated to Shean, after the testator's death, he stated that he would not take the gift for himself, but would hold the property for the benefit of the church.

The plaintiff's claim was as a legatee, and one of the residuary legatees, for the administration of the real and personal estate of the testator, and for a declaration that the devise of the said dwelling-houses, and so much of the legacy of £600 as was properly payable out of the lands, tenements, and hereditaments of the testator, were and formed part of the residue bequeathed by the residuary clause in the will.

The question argued was, whether the devise to James S. Steele and James F. Shean, as tenants in common, who had no notice of the trust at the date of the execution of the will, was valid or whether the devise to all three failed.

Matheson, K.C., *O'Shaughnessy*, K.C., and *M'Gonigal*, for the plaintiff.

Hume, K.C., and *James Andrews* (with them *James Chambers*, K.C.), for the defendants :—

The defendants Steele and Shean are in a different position from Semple. There is no evidence to show that there was any communication of the trust to them at the date of the execution of the will or prior to the death of the testator, nor did they give any assent to carry out the illegal intention of the testator, so as to throw an obligation on them to carry it out, and to constitute a fraud if they failed to do so. *Russell* v. *Jackson* (1), *Jones* v. *Badley* (2), and *Springett* v. *Jenings* (3), have no application to the

(1) 10 Hare, 204. (2) L. R. 3 Ch. App. 362. (3) L. R. 10 Eq. 488.

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present case, as they were cases of joint tenants and not tenants in common. When one of joint tenants has knowledge of an illegal intention on the part of a testator before the execution of the will, and promises to carry it out, and the will is made on the faith of such antecedent promise, the entire gift is vitiated; but that is not so in the case of tenants in common: *Freeman* v. *Laing* (1); *Tee* v. *Ferris* (2); *Rowbotham* v. *Dunnett* (3); *Moss* v. *Cooper* (4); *Re Stead, Witham* v. *Andrew* (5).

O'Shaughnessy, K.C., in reply:—

The devise was procured by the fraud of Semple, who was himself to benefit by it, the object of the trust being to augment his salary. Once establish fraud, and the equitable doctrine applies that the other devisees cannot avail themselves of that fraud, whether they be joint tenants or tenants in common. The cases cited by the other side are thus clearly distinguishable. *Jackson* v. *Russell* (6) supports this contention.

April 24.

THE VICE-CHANCELLOR:—

This action was brought for the administration of the real and personal estate of James Withers, and for a declaration that a devise of certain houses of the testator and a legacy of a sum of £600, so far as same should be payable out of the real estate and chattels real of the testator, to the defendants Semple, Steele, and Shean was void, and fell into the general residue of the testator's real and personal estate.

The will bears date on the 23rd November, 1899, and was executed on that day. The testator died on the 15th December following, which, being within three months of the making of his will, the 16th section of the Charitable Donations and Bequests Act, 1844, renders void, as regards any estate in lands, tenements, or hereditaments, any gift for pious or charitable uses in Ireland, unless the deed, will, or other instrument containing the same, shall be executed three calendar months before the death of the

(1) [1899] 2 Ch. 355.
(2) 2 K. & J. 357.
(3) 8 Ch. D. 430.
(4) 1 J. & H. 352.
(5) [1900] 1 Ch. 237.
(6) 10 Hare, 204.

person executing the same. This enactment was founded on important grounds of public policy, which are not to be fraudulently evaded or lightly disregarded.

In this case it is established clearly and conclusively that the sole desire and intention of the testator were to leave this gift to a particular charitable purpose, and it is proved beyond doubt and admitted by all the legatees that he never intended to give them any beneficial interest, and that he used them merely as conduits to carry the beneficial interest in every subject of this gift to the Presbyterian congregation, the object of his charitable intention. On the evening before the making of the will, which has been proved, he made another will in the presence of the defendant Semple, prepared for him in his presence and by his express instructions by the solicitor's clerk Stewart. This will contained an express trust for the same charitable object. After its execution a doubt was expressed originating with Stewart or with the testator himself, I think the latter, as to his living for three months, and these three persons had a general apprehension that this charitable gift would in that event be rendered void by the statute, and they set themselves to devise a plan how the statute might be evaded ; and it was suggested, that if the gift were made in the form of an absolute bequest to persons, whom they could safely rely on to pass it on to the charitable purpose, which alone was contemplated by the testator, they might thus successfully defeat the statute. They discussed what two persons might be thoroughly depended on, and on the nomination of the defendant Semple they agreed upon the defendants Steele and Shean. They are clearly proved to have known that there must be no trace of any trust appearing in the will, nor anything even to raise a suspicion on the subject. Stewart left and went to his employer to consult with him, and between them they prepared the will in question. They of course omitted the words of trust, and they inserted the word "absolutely," and they made the gift to these persons "as tenants in common." These words they knew would be false, as they fully intended that the gift was not to be absolute, but to be subject to a secret trust, and they knew the legatees were not to take as tenants in common, but they thought they would assist the

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deception they were carrying out. They brought this new will to the testator, and got it executed by him and duly attested.

In the view that I take of the case it is not material, whether the defendants Steele and Shean were or were not parties to the transaction; but it is only just to them to say that they do not appear to have had any part in the plan, or any knowledge at the time of what was going on. The defendant Shean certainly had not, and did not even hear of the will being made till after the testator's death. Steele witnessed the first will, but he swears that he knew nothing of its contents, and I see no reason to disbelieve him. Both now claim the gift, but not beneficially, and only for the charity. It is very different with the defendant Semple, for he was an active party to the entire transaction. He knew perfectly that the testator's whole intention was to give the property in question to the charity. He does not attempt now to claim any share of it absolutely or beneficially, but unfortunately for him he cannot divest himself of a personal interest in the matter, for though the *corpus* of the gift was to be held in trust for the charity, the income was to go to augment the stipend of the minister, namely, himself.

Nor do I think that in this case it is necessary to consider what the effect is of the trustees Steele or Shean not having been proved to have had notice or knowledge of the supposed trust in the life of the testator. The suit is not based upon a secret trust, with the view of attaching such trust upon an apparently absolute gift to them, jointly or severally. The plaintiffs contend that there was a secret trust, but they use it to invalidate the whole gift, not to enforce it, and attach a trust upon it. The trust was for the charity, and being created it was avoided by the statute in the event that happened. The legatees do not claim it for themselves, but they say that it was given to them nominally to do as they pleased with it, and to appropriate it for their personal benefit, but that they knew that such was not the intention of the testator. The case of *Russell* v. *Jackson* (1) is a very important authority, and clearly resembles the present. The testator there intended to leave the property to a purpose, which the law prevented being carried into effect, and being aware of this he said,

(1) 10 Hare, 204.

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as stated by the Vice-Chancellor, "I will leave the property to the Jacksons; they know my wishes, and I am satisfied they will carry out my intentions": and he asks, "Does not that amount to an undertaking—a promise on their part—to carry out the intentions of the testator"; and he says that the true test of the answer to the question is this—Would the testator have left the property to the defendants if they had stated that they would not carry out the secret object. Here the defendants have not claimed this devise as for their personal use. They admit the trust intended by the testator, and it could not for a moment be thought that they would have been nominated by the testator as his legatees and devisees but for his firm conviction that they would carry out his design. As to the defendant Semple, there can be no question, for he avowedly took an active part in the plan. As to the defendants Shean and Steele, they do not appear to have been concerned like Semple in getting up this plan, but they took all the interest they apparently were given through Semple, and cannot stand in a better position than he did. They were volunteers; and even if they are not themselves affected with notice of the real nature of this fraudulent transaction, they could not claim to be in a better position than Semple, nor do they attempt to do so.

On a careful consideration of the whole facts of this case, I am of opinion that this alleged gift cannot be supported, and that it fails altogether, and the property the subject of it was undisposed of by the will.

J. MAC M.

Appeal. Nov. 14.

Mr. Semple, Dr. Steele, and Mr. Shean appealed (1).

T. J. Andrews (with him *Hume, K.C.*, and *Chambers, K.C.*), for the appellants.

Matheson, K.C., ***O'Shaughnessy, K.C.***, and ***M'Gonigal***, for the respondents.

(1) In the Court of Appeal before FITZGIBBON, WALKER, and HOLMES, L.JJ.

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FITZ GIBBON, L. J. :—

We do not require a reply. The appeal was opened by Mr. Andrews in a manner that left nothing to be desired. He referred to all the authorities, and we have fully heard Mr. Matheson on the other side, and the question is a difficult case with much to be said on each side.

The disposition of the property in dispute is not one single gift to three people ; there are three distinct gifts of different shares of property, one to each of three devisees, tenants in common, no doubt made with the purpose and in the expectation, on the part of the testator, that the property given to each and all shall and will be applied to the same charitable object. As regards one of the three, the Rev. Mr. Semple, it has been proved that he was party to an arrangement, or understanding, with the testator, before the will was made, that the property should be so applied ; and whether that arrangement or understanding was indicated by express language, or by silent acquiescence on Mr. Semple's part, makes no difference. His conscience was bound by a secret trust which, in the event which has happened, invalidates the devise to him. He knew beforehand that the gift to him was made in form absolute, but with the intention on his part, as well as on that of the testator, of evading the law, which would make it void, if given for the charitable purpose, if the testator should die within three months.

It is established law that a secret trust invalidates the gift when, if the property had been given upon an express trust to the same effect, the gift would have failed.

It is also established that, where property is given to several persons jointly on a secret trust which binds one of them, and fails, the infirmity affects the whole gift. But where property is given in separate shares to distinct people as devisees in common, one being bound by a secret trust, and the others not, the only gift which can be affected is that which is taken by the secret trustee. Whether the intended purpose is identical as to each of the shares, or whether, as in the case referred to by Lord Hatherley (1), one piece of property is given to A for one purpose, another to B for another purpose, and a third to C

(1) See *Tee* v. *Ferris*, 2 K. & J. 365.

for a third purpose, the result must be the same; if two of the devisees are not affected by any trust, though the third is bound, the devises to the two who are entitled to take absolutely cannot be avoided by the trust which affects the gift to the third.

A distinction was sought to be made between the case where the charitable purpose is indicated *before the will* to one of several devisees, and is accepted by him as a secret trust; and the case where the gift in terms absolute is first made in joint tenancy and a statement of the charitable purpose is afterwards made to one or more of the devisees. But I think the distinction must depend upon whether the gift is one single joint gift of the whole property, or there are several gifts; and a gift in common is, in my opinion, to be regarded as so many separate gifts of distinct things to different people. If the man who was the *dux facti*, in accepting the trust, took the property jointly with others, knowing it to be intended for a charitable purpose, none of it could be taken absolutely; but if it, or any part of it, was given absolutely to a person who, when it was given, knew nothing of the intention to devote it to charity, that devisee could not be deprived of it by the fact that some one else knew of the intention.

The "O'Hagan Clause" has been recognised in Ireland as a valid mode of disposition, and under it an express trust for a charitable purpose is followed by an absolute gift, very often to the same devisee, which is to take effect in the event of the charitable trust becoming or proving void.

The law is settled that an absolute gift by will cannot be defeated by proof that it was made in the expectation that the devisee will apply, or will even hold himself bound in honour to apply, the property to a charitable purpose which would otherwise fail, provided always that the gift is absolute, and that the property is intended by the testator to reach the destination for which it is intended, through the voluntary exercise by the devisee of his own right of ownership, and not through any obligation of conscience, or of contract, or in pursuance of any previous arrangement or understanding, binding the conscience of the devisee, and so making him a secret trustee for a purpose which is illegal.

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The circumstances show that there never was a disposition of property which more clearly originated with the testator himself, or which was more clearly intended to be in law and fact an absolute gift, though expected to benefit a charity, than the present one. He first made a will expressing the charitable trust. He had some misgiving as to its validity; and he asked the solicitor's clerk, who was taking his instructions, whether it would be good if he died within three months. The clerk, who seems to have been a prudent and intelligent man, consulted his principals, and they advised that the property must be given absolutely, in order to make the devise good; but that it might be so given to persons upon whom the testator could rely to carry out his wishes, if he should die within three months. The first devisee was the clergyman of the church for the benefit of which the gift was intended. He knew all about it before the absolute gift was made; he and the testator mutually understood from the beginning that the property was to be devoted to the charity, and it is conceded that the gift to him is bound by a secret trust, and fails.

The second devisee was the doctor who was attending the testator, but he knew nothing about the trust. The third was Mr. Shean, who was first mentioned by the clergyman, and was made a devisee by the testator on the very shadowy statement that he would carry out anything that the testator wished. Mr. Shean knew nothing about the will until after the testator's death, and then he proclaimed that, so far as he was concerned, he would not take the property for himself, and that he would not have anything to do with it. That being so, we have three distinct gifts, each of one-third of the property, and two of them were made without any element of duty or trust, but simply in reliance on the willingness, or on the honour, of the devisees, to devote the property to the purpose to which the testator desired to devote it, in the event of his dying within three months.

The vast number of cases in which testators with children have given their property absolutely to their wives are really cases depending on the same principle. There is an intention, in every such case, that the property shall not be retained by the wife as exclusively her own, but that she shall devote it to the children;

but the testator leaves it to her to apply it for their benefit, in the exercise of the absolute ownership which he confers upon her. It would be as impossible, as it would be inexpedient, to attempt to affect such gifts by trusts.

It was suggested that because, after the testator's death, Mr. Shean said that he was a trustee, and that he would only take the property as a trustee, he could not take or keep it. But in effect he said: "I will take the property only to do with it what the testator intended." That is not a declaration of trust, and it can not affect the right of the devisee to take the property. If he were a trustee he could not take it at all; but he has not disclaimed the devise, he has only stated that he will not apply it for his own benefit, and he, as absolute devisee, is at liberty to apply it to the object of the charity none the less because that object was in the testator's mind.

We must vary the order of the Vice-Chancellor by limiting the declaration of invalidity to the one-third of the property which was left to the Rev. Mr. Semple, and declare that the other two-thirds went absolutely to Dr. Steele and Mr. Shean as tenants in common. The plaintiff will be allowed her costs of suit up to and including the hearing before the Vice-Chancellor, to be paid out of the estate, as she represents all the legatees, and the case is one in which it was necessary to take the opinion of the Court of Chancery. The executors will have their costs in the same manner. Dr. Steele and Mr. Shean must be allowed their costs in the Court below, and of the appeal. These costs will be paid, in the first instance, so far as the amount will allow, out of the one-third portion of the property which was devised to the Rev. Mr. Semple. He must abide his own costs.

WALKER, L.J.;—

Upon the facts in this case I do not think there was any inducement used by Mr. Semple, even as regards Mr. Shean, to attract the doctrine of *Huguenin* v. *Baseley* (1) and *Russell* v. *Jackson* (2) so far as it applies to that case.

The testator knew the law perfectly well, and knew that he must rely on the honour of the persons whom he would name as

(1) 14 Ves. 273. (2) 10 Hare, 204.

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legatees, and accordingly by a will which has been proved in solemn form he gives the houses by separate gifts to those three gentlemen as independent gifts. Mr. Semple first suggested, in order to satisfy the object of the testator, the name of M'Millan; the testator would not accept him, and then Mr. Semple mentioned the name of Shean, whom the testator accepted, being satisfied, with full knowledge of the law and the effect of the gift, that he might rely on his honour. The testator was as much the person who selected Shean as Mr. Semple was. Each legatee gets a separate interest; and I cannot see how any inducement of Semple as regards himself can be extended to Shean, much less to Dr. Steele, whom he did not name.

Then Mr. Matheson, on the hypothesis that Mr. Semple has induced the gifts in the will, argues as matter of law that the gifts not only to Semple, but to Dr. Steele and Mr. Shean, as tenants in common, fail, though neither of them had any knowledge of the dispositions in the will, or the testator's wishes, till after the death of the testator. I suggested to him during the argument that this could have no application to the case of Dr. Steele, whom Mr. Semple did not name; but, apart from that, I do not agree that the authorities bear out Mr. Matheson's contention.

It is true that the cases have established that if a testator is induced by A, on the faith of a promise made by him, that he will carry out a trust communicated to him to make a gift in joint tenancy to him A and B, the trust binds both A and B; but if the gift having been made in joint tenancy without any knowledge or promise of A, he (A) after the will makes a similar promise by reason of which the will is left unrevoked, the trust binds A only. I share the difficulty felt by Farwell, J., in *Witham* v. *Andrew* (1) of seeing the difference between the two cases, but it is not necessary in the present case to express any opinion on the point. In the case before us the gift is to Semple, Steele, and Shean as tenants in common—gifts quite as separate and independent as if a different house were left to each of them—and in such a case *Tee* v. *Ferris* (2) and *Witham* v. *Andrew* (1) have established that a different rule applies from the case of a joint tenancy. Farwell, J., says—"If A induces B either to make or leave unrevoked a

(1) [1900] 1 Ch. 237. (2) 2 K. & J. 357.

will leaving property to A and C as tenants in common by expressly promising or tacitly consenting that he and C will carry out the testator's wishes, and C knows nothing of the matter until after B's death, A is bound, but C is not bound." On the two grounds therefore that there was no inducement, even in the case of Mr. Shean, within the meaning of the authorities, and that the gift here was to the devisees as tenants in common, I am unable to concur in the argument for the respondents.

The last contention put forward, viz. that there was here a trust declared after the death, which the Court should carry out, seems to me quite untenable. It proceeds on the assumption that the legatees had an absolute interest unfettered by any trust, and what they, or one of them, said was attributable to that ownership —an expression of intention to do what they liked with their own— in other words that, quite irrespective of any trust, they would as a matter of honour, and by virtue of their ownership, do what they know now the testator would have wished. Mr. Shean's statement means—I will hold the property for the church, because I am owner, and by virtue of my absolute ownership.

I concur in the rule as to costs.

HOLMES, L. J. :—

It often happens, when the doctrine of secret trust is sought to be applied, that there is a difficulty in ascertaining the facts. This does not exist in the present case, as the evidence shows clearly what happened. The testator desired to give three houses and £600 in trust for a charitable purpose, and he executed a will containing a gift of this property to his executors upon the trust intended. It then occurred to him that if he were to die (as he did) within three months, the trust, in so far as it related to real estate or chattels real, would fail; and, having consulted his lawyer, he was advised that the only way in which the suggested difficulty could be avoided would be to give the property to one or more persons absolutely, in the hope that when they would come to know the testator's wishes, he or they would carry them out. The testator accordingly had a new will prepared, by which he gave the houses and money to three persons, named Semple, Steele, and Shean, as tenants in common, without attaching any

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trust. It has been assumed by Mr. Matheson in his argument that there was some impropriety in this; and, on my asking him in what it consisted, he said that it was a fraud upon the statute. I have heard this expression before, but I do not understand it. There is no fraud in doing what the law permits; and an absolute devise of lands, unfettered by a trust, is valid, even if the testator were to die the next day, and if the devise were made on the chance and in the hope that the devisee would apply it to some charitable purpose. In this case there is no doubt that if the three legatees had heard nothing about the gift to them until after the testator's death, the property would have belonged to them in equal shares, each being entitled to do what he liked with his own share. This happened in the case of two of them, Dr. Steele and Mr. Shean. The first knowledge they had of the contents of the will, or of the fact that they were named in it, was when it was read on the day of the funeral. Mr. Semple was present when the matter was discussed between the testator and his lawyer, and he knew that the property was given to the devisees in the hope that it would be applied by them to the charitable purpose. Mr. Matheson has spoken of Mr. Semple inducing the testator to make the gift and of his being an agent in bringing about a fraud. There is nothing to justify either allegation. The plan of making an absolute gift came from the solicitor, and was adopted by the testator, Mr. Semple's only interference being that he suggested the name of Mr. Shean. The reference to fraud arises from a confusion of ideas. When we speak of fraud in connexion with secret trusts, what is referred to is the fraud of a man allowing a testator to bequeath him property in the expectation that he will hold it in trust, and afterwards claiming it as his own. To prevent such a fraud as this, the law attaches the trust to the property; and as Mr. Semple was informed by the testator of the object of the gift, he must be held to have taken his third share in trust, with all the consequences flowing therefrom. But why should any trust be attached to the other two-thirds?

It is, I think, settled that where a gift is given to two persons as joint tenants, a secret trust imparted to one of them will affect the whole gift; but that this arises from the peculiar nature of a

joint estate is shown by repeated decisions that this rule does not apply to tenants in common. It is admitted that if, after he had made the will, the testator had informed Mr. Semple alone of what he had done and of his object, the shares of the others would not have been affected with the trust; but a distinction is sought to be drawn from the fact that the communication was made before the will. This would be a purely arbitrary and illogical distinction. There is no difference in principle between the gift of undivided shares to three persons in severalty and a gift of one of the houses and £200 to each of the legatees. I hold, therefore, that Steele and Shean became absolutely entitled to their shares; and although they may now say that they will hold them for the charitable purpose intended by the testator, this is their own act, and, not being a trust imposed by the testator, is legal and valid.

Solicitor for the plaintiff: *T. Erskine Alexander.*
Solicitors for the defendants: *Shean & Dickson.*

R. D. M.

HENNESSY *v.* LAVERY.

(1902. No. 393.)

Practice—Discovery after judgment.

Order for discovery granted to plaintiffs, who had obtained a judgment for an injunction against the defendant and an account of profits, discovery being necessary for the proper ascertainment thereof.

MOTION.

By judgment in this action, dated the 19th day of June, 1902, it was ordered that the defendant should be restrained from infringing the plaintiffs' registered trade-mark, and from infringing the plaintiffs' trade-name of "Hennessy" in connexion with the sale of brandy, and from passing off brandy not the plaintiffs' manufacture as and for the plaintiffs' brandy; and it was referred to Chambers to take an account of the profits realized by the defendant from the sale of brandy, other than the plaintiffs' brandy, as plaintiffs' brandy.

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Pursuant to the said judgment, the Chief Clerk, by his ruling of the 23rd of July, 1902, directed the defendant to have the account duly verified by the 1st of October following, and the plaintiffs to serve notice of surcharge by the 1st of November.

The plaintiffs moved for discovery, the Chief Clerk having declined to entertain the application in Chambers.

In the affidavit, upon which the motion was grounded, the plaintiffs' solicitor alleged that for the purpose of enabling the plaintiffs to test the accuracy of the account which the defendant had lodged, in pursuance of the above-mentioned ruling, it was necessary for the plaintiffs that the defendant should make discovery of all books and documents, &c., relating to the sale of brandy by the defendant, and that the defendant had such books and documents in his possession, and that the plaintiffs had no means of obtaining access to same save by discovery.

Blood, K.C., and *T. Henry Maxwell*, for the plaintiffs, pointed out that there was no limit of time fixed by Order 31, Rule 1, for obtaining discovery, and that discovery was the only means by which the judgment could be properly worked out. They referred to the Annual Practice (1903), pp. 369, 370, and to *Maxim Nordenfeldt Guns and Ammunition Company* v. *Nordenfeldt* (1).

M'Grath, for the defendant, did not resist the application.

THE VICE-CHANCELLOR made an order for discovery, as sought, and reserved the question of costs.

Solicitors for the plaintiffs: *Kennedy & Figgis.*
Solicitor for the defendant: *Donnelly.*

J. MAC M.

(1) [1893] 3 Ch. 122.

COLLINGS *v.* WADE.

(1893. No. 683.)

V.-C. 1902. Dec. 1.

Practice—Change of parties—Death of a defendant after judgment declaring the defendants liable for breach of trust—Order to continue proceedings on application of co-defendant seeking contribution.

In an action against trustees for a breach of trust, one of the defendants paid into Court a sum for which the defendants were subsequently declared liable. Some years after the final judgment in the action a co-defendant, who at the time of the judgment had no means, died entitled, as alleged, to a policy of insurance which then became payable. On the application of the first mentioned defendant, who desired to seek contribution from the estate of the deceased, the Court made an order for continuing the proceedings against the personal representative of the latter.

MOTION.

The action was brought by Eliza Maria Collings and others against Edward Fry Wade, Charles Meade Harvey, and Samuel John Skinner (amongst other things) to make them liable as trustees of a settlement for certain breaches of trust.

By the judgment, dated the 10th November, 1894, E. F. Wade submitting to lodge in Court to the credit of the action a sum of £516 6*s.* 6*d.* (being trust moneys received by E. F. Wade and C. M. Harvey while they were the trustees of the settlement, and lent by them to the husband of E. M. Collings, whereby the said moneys were lost), without prejudice to any right to contribution or indemnity the said E. F. Wade might have against the other defendants, it was ordered that he lodge the said sum accordingly. He made the lodgment on the 8th December, 1894.

By the judgment on further consideration, dated the 6th December, 1895, it was (amongst other things) declared that E. F. Wade and C. M. Harvey were guilty of breach of trust in so lending the said sum of £516 6*s.* 6*d.*, and it was ordered that the defendants should pay the plaintiffs' costs; and any of the parties were to be at liberty to apply as there might be occasion.

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COLLINGS v. WADE.

See report of the case, [1896] 1 I. R. 340.

The plaintiffs' costs were taxed and paid by E. F. Wade.

S. J. Skinner and C. M. Harvey brought in other portions of the trust funds.

C. M. Harvey died on the 1st April, 1902, and on the 4th July, 1902, letters of administration to his estate were granted to William Watson Harvey.

This was a motion on the part of E. F. Wade that the proceedings in the action might be continued against W. W. Harvey as such administrator for the purpose of enabling E. F. Wade to make such application as he might be advised for contribution out of the assets of C. M. Harvey to the sums paid by Wade.

An affidavit stated that no steps were taken by E. F. Wade to make C. M. Harvey contribute, as he was a man of no means; that his life had been insured for £1000, which would be paid to his administrator; and that application had been made to the latter to contribute, but that he declined to do so, repudiating any liability on the part of the assets of C. M. Harvey for contribution.

The application had been made *ex parte*, but the Vice-Chancellor had then directed notice to be served.

Sugrue, in support of the motion :—

The only question is whether E. F. Wade must bring a fresh action for contribution, or whether he can obtain the necessary relief in the present suit. If on lodging the money he had applied for relief, the Court would have directed an inquiry as to the proportions in which the sums paid should be borne: see Lewin, Law of Trusts (10th ed.), 1117, note (*h*). An independent action would cost several times as much as the necessary proceedings in the present one.

Dunn, for W. W. Harvey :—

Payments in respect of the trustees' liability were made not only by E. F. Wade, but also by C. M. Harvey and S. J. Skinner. The applicant lay by for seven years without taking any step, and now after that lapse of time he seeks contribution

because he hears a policy has fallen in. However, if the Court considers there is jurisdiction to decide the question in the present suit I will not oppose further.

Sheehan, for the plaintiffs:—

The plaintiffs have been paid everything they were found entitled to, including costs, and the suit, so far as they are concerned, is at an end. If it is now revived for the purpose of working out equities between the defendants, the plaintiffs may be put to expense in attending inquiries, &c.

THE VICE-CHANCELLOR made an order that all further proceedings in the action be carried on and prosecuted between the plaintiffs and Edward Fry Wade, Samuel John Skinner, and William Watson Harvey, administrator of Charles Meade Harvey, deceased, as defendants, in like manner as same would have been between the plaintiffs and the defendants in the title named, if the said Charles Meade Harvey had not died.

Solicitors for E. F. Wade: *Justin MacCarthy & Co.*
Solicitor for W. W. Harvey: *Henry P. F. Donegan.*
Solicitor for the plaintiffs: *Graham A. Goold.*

D. M'C. M.

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1902.
June 13, 18.
July 1.
Appeal.
Nov. 17.

DAWSON *v.* M'GROGGAN.

(1902. No. 68.)

Turbary, right of—Profit a prendre—*Enjoyment as of right—Presumption of lost grant—Mistake.*

Sub-tenants of lands held under a lease for lives renewable for ever cut turf, during a period exceeding sixty years, for their own use, on lands of the lessor not included in the demised premises, which comprised bog as well as arable and pasture. They believed that they had a right to do this, as the lease contained words giving leave to cut turf for firing on the lands of the lessor.

The lease, in fact, contained no such words, but a lease of adjoining lands, made between the same parties, did contain such words. The cutting was permitted by the lessor, as his agent believed that the right existed under the lease.

An injunction was sought to restrain the tenants from cutting turf:—

Held, that a lost grant should be presumed.

De La Warr v. *Miles* (17 Ch. D. 535) applied.

Trial of Action.

This was an action for an injunction to restrain the defendants from cutting turf on the lands of the plaintiffs, and was heard, with witnesses, before the Master of the Rolls.

The facts of the case, the effect of the evidence, and the arguments sufficiently appear in the head-note and judgment.

Wylie, K.C., and *Gaussen*, for the plaintiffs.

Ronan, K.C., *Gordon, K.C.*, and *Kerr*, for the defendants.

[The following authorities were referred to in addition to those cited in the judgment:—*Hargrove* v. *Congleton* (1); *Dobbyn* v. *Somers* (2); *Lowry* v. *Crothers* (3); *Warrick* v. *Queen's College Oxford* (4).]

(1) 12 I. C. L. R. 368.
(2) 13 I. C. L. R. 293.
(3) I. R. 5 C. L. 98.
(4) L. R. 6 Ch. 716.

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July 1.

THE MASTER OF THE ROLLS:—

This action is brought to restrain the defendants, ten in number, from trespassing upon and cutting turf in the plaintiffs' lands in the townlands of Leitrim and Creagh, part of the manor of Castledawson, in the County of Londonderry, and for consequential relief. The plaintiffs' title to the lands in question, though formally traversed, was not questioned at the hearing, nor was the doing of the acts complained of, the only contention being that the defendants had a right to do them.

By lease of the 25th April, 1710, made between Joshua Dawson and Thomas Hammersley, the former who was the predecessor in title of the plaintiffs and owner in fee of the manor of Castledawson demised to Thomas Hammersley all that part of the lands of Anaghorish and Broaghmore, a map of the survey whereof was thereto annexed, containing 107A. 1R. 10P., arable meadow and pasture, with 29 acres of bog English statute measure, situate in the townlands of Maola, barony of Loughinshollin, and County of Londonderry, with all and singular the rights, members, privileges, advantages, easements, and appurtenances thereunto belonging, to hold the said premises unto the said Thomas Hammersley, his heirs and assigns, subject to the rent thereby reserved, for the lives of the persons therein mentioned, with the benefit of the covenant for perpetual renewal therein contained, which premises were contained within the manor of Castledawson, in the said County of Londonderry. By another lease of the 7th of April, 1711, made between the same parties, Joshua Dawson demised to Thomas Hammersley certain other premises described as part of the lands of Broad Meadow, near to the town of Castledawson, containing 13A. 0R. 10P., English statute measure, together with two tenements in the said town, with a piece of ground called Pitt's Acre, and containing 1A. 2R. 12P., described on the annexed map, with sufficient moss-leave for his said tenements, situate in the manor of Castledawson, with all the rights, &c., thereto belonging, to hold to him, his heirs and assigns, subject to the rent thereby reserved, for the lives therein mentioned, with the benefit of the covenant for perpetual renewal therein contained.

By a third lease of the 27th October, 1716, the said Joshua Dawson demised to the said Thomas Hammersley a plot of ground

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containing 40 acres of arable and pasture land, English statute measure, bounded on the south by land known as the Barrack Land, on the east by the bog at foot of Inishabrisland, on the north by land set to Captain Hugh M'Lorian, and on the west by the road at the new cut, with sufficient moss-leave for firing to be expended on the premises, situate in the said manor of Castledawson, with all the rights, &c., thereto belonging, to hold to him, his heirs and assigns, subject to the rent thereby reserved, for the lives therein mentioned, with the benefit of the covenant for perpetual renewal therein contained. There is no reference in this lease to any map.

By indenture of renewal, dated 1st of August, 1800, comprising in one instrument the three leases of 1710, 1711, and 1716, Arthur Dawson demised to Hans Stewart (in whom the lessors and lessees interest respectively had become vested) the several premises demised by the three leases, and in the said indenture described as "the parcel of land being part of Anaghorish and part of Broaghmore, containing 107A. 1R. 10P., arable meadow and pasture, together with 29 acres of bog, English statute measure, and all that part of the Broad Meadow near the town of Castledawson, containing 13A. 0R. 10P., marked No. 3, together with two tenements in the said town, marked No. 1 and No. 2, with a piece of land called Pitt's Acre, containing 1A. 2R. 19P., with sufficient moss-leave for firing to be expended on the premises" (not stating what premises), "and all that parcel of ground containing 40 acres of arable pasture ground, English statute measure, as formerly in the possession of Captain Thos. Hammersley, with sufficient moss-leave for firing to be expended on the premises, together with the rights, members, and appurtenances thereunto belonging, situate in the said manor of Castledawson and County of Londonderry," to hold the said premises with the appurtenances unto the said Hans Stewart, his heirs and assigns, subject to the rent thereby reserved for the lives therein mentioned, or the lives of every other person to be added thereafter by virtue of the covenants for renewal in the said deeds contained.

By fee-farm grant of 17th September, 1851, made under the statute, the lessee's interest in the lease of 1800 was converted into an estate in fee-farm. The grant was made between George Robert

Dawson of the one part and Michael Stewart of the other part. It followed the description in the lease of 1800 as to all the lands, and referred to a map on a lease of May 13th, 1721, which was a renewal of the lease of 25th April, 1710. Separate fee-farm rents were reserved corresponding with the rents in the three leases.

It appears that the estate of the lessors has been in strict settlement since 6th May, 1848, and in 1851 George Robert Dawson was tenant for life thereof. There was, therefore, no one having power to make the fee-farm grant save under the Renewable Leasehold Conversion Act, and since 1848 apparently no one having power save under some statutory authority to bind the fee. The plaintiffs do not appear to have disputed the right of the tenants under the leases of 1711 and 1716, or the fee-farm grant so far as it relates to those leases, to cut turf on land of the plaintiffs not comprised in them; but they say that the lease of 1710 gave no right of turbary at all; probably because the land demised by it included 29 acres of bog, no land described as bog being demised by the other two leases. They also say that in so far as the tenants of Anaghorish and Broaghmore have at any time cut turf on other parts of the Castledawson estate, they have done so by permission, or by reason of a mistake as to the effect of the renewal of 1800, and the fee-farm grant, which, lumping all three leases together, may have left it ambiguous whether the words "with sufficient moss-leave for firing to be expended on the premises," where they first occur, were not meant to apply to the lease of 1710, in which they are not found, as well as to that of 1711, where they are.

If this were the only point in the case, I should (as I said very early in the argument) have no hesitation in deciding that the renewal gave in this respect no larger rights than the leases themselves, and must be construed as if there had been a simple renewal of each lease separately, in which case there could have been no claim to cut turf outside the limits of the lease of 1710.

The plaintiffs' witnesses proved, without difficulty, that the defendants had themselves, or by their servants, each cut turf on the bog of Leitrim and Creagh, and that they were tenants on the Burrowes' (that is the Hammersley) estate. The place was clearly defined, and shown to be outside the limits of the lease to

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Hammersley, now represented by the owners of the Burrowes' estate.

In this state of facts a clear *prima facie* case was made, and it lay on the defendants to show, under their pleading, some justification either by virtue of lost grant, prescription, or as alleged in the 9th paragraph of the statement of defence. In this paragraph they say that they are tenants at a judicial rent of Mrs. Burrowes, successor in title of George Burrowes, deceased, in whom the grantee's interest in the lands comprised in the three leases, and fee-farm grant was vested, and which, together with all the rights, members, privileges, advantages, easements, and appurtances thereunto belonging, including sufficient moss-leave for firing to be expended on the premises, were at the time of the doing of the acts complained of vested in the said Mrs. Burrowes.

I have already considered this last ground of defence.

The prescription relied on is from immemorial user, and not for any statutory period of thirty or sixty years; and for reasons which may easily be understood, the defence of prescription was not relied on and is out of the case.

Manus M'Groggan, one of the defendants, who was examined, is seventy-five years old; Henry M'Groggan is nearly eighty; Henry Gribbon is seventy this year; James Mallon sixty-seven. These and other witnesses made as complete a case of user by the occupying tenants of the lands in the lease of 1710 of the right of cutting turf on other parts of the plaintiffs' lands as it is possible to imagine. They were all credible and intelligent witnesses, utterly unimpeached on cross-examination, having excellent memories, and they carried the user back for sixty to seventy-six years, not as commencing then, but remembered by them from the earliest times as an existing exercise of a right, neither *vi*, nor *clam*, nor *precario*. Each tenant in Anaghorish and Broaghmore had a separate plot or portion of turf, used exclusively for his own holding; never for sale, always to use. Permission was never asked. Rent was never paid or demanded. The turf was cut, saved, and carted away openly.

When one turf bank was cut out, another was set apart for these tenants by the estate bailiffs, and has been used ever since. So long ago is this, that when the cut-out bog was left, the place

was planted by the Dawsons with trees, and these trees grew up, flourished, and have long since been cut down; yet it is remembered by some of the witnesses. When the new site was allocated for turf-cutting, roads were made by Mr. Hunter, the agent for the Dawson estate, and are still used exclusively by the Anaghorish and Broaghmore tenants. When one of them, James Mallon, complained to the under-agent, Mitchell, that his bank was cut out, Mitchell said, "You *be* to get another bit" (meaning, as I well know, you *must* get another bit); and "measured it off and nicked it with a spade" accordingly. When disputes arose among the Anaghorish tenants they were settled by the under-agent, precisely as if they had arisen amongst direct tenants of the Dawson estate, having each a right to turf. I do not think I ever heard a more complete case proved of regular, open, uninterrupted user as of right; not claimed or exercised by all the inhabitants of a locality, or by a class collectively, but by each tenant of a particular holding, and in respect of that holding. No case of the sale of turf was shown; no year in which the right (if right it was) was not exercised; no permission asked, granted, or refused; no rent paid or demanded; no interference with those cutting turf, save such as is always exercised by an owner in fee over whose land there is a right of turbary, that is, the power to point out the place where those who have the right may reasonably exercise it. Indeed, there has been singularly little of even that amount of interference, though the right to interfere in that way has always been admitted. I may add that I do not think any of these people thought he was doing an illegal thing. They thought they were quite within their rights.

How then does the law stand? The defendants placed their main reliance upon the plea of lost grant. They said:—"Here you have a course of dealing for upwards of sixty years, nay, going back to seventy-five years. Every act during that time, on every day, and in each and every year, was unlawful and a separate trespass, unless it was done as of right; and if the acts have been done as of right, and if such a right can have had a legal origin, the Court is bound to assign such an origin to it, and, if necessary, to find a lost grant, whether or not actually believing in the existence of such a grant, or its loss."

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Into the ethics of this mode of procedure it is hardly needful to enter. When the doctrine of (imaginary) lost grant was first sought to be introduced by a modern civilian, Merlin denounced the attempt "as teaching to pleaders and practitioners dishonest artifices (*des chicanes*), which they are only too prone to take advantage of" (1). Other and more recent authorities have objected to the immorality of telling juries that they are at liberty, on their oaths, to find as a fact, what they believe not to be a fact, or at least what they have no affirmative belief in, as a fact.

The question is now, however, not one of morals. Few cases have been more carefully considered and discussed than *Dalton* v. *Angus* (2), of which a very good synopsis in all its stages will be found in Gale on Easements, 7th ed., p. 173. Amid a considerable variety of judicial opinions as to the mode in which the result was to be arrived at, that case may be taken as having conclusively and finally determined that where the doctrine of lost grant would otherwise be applicable, its application will not be prevented by merely showing as a matter of probability or even as a matter of fact that no grant was actually made; and further that under such circumstances it is the duty of the Courts to apply any legal presumption necessary to validate the user.

There can, however, be no inference of lost grant where the right in question was one which could not legally be granted, as where from the state of the title there was not anyone who could have granted it. *Dalton* v. *Angus* (2) was the case of an easement; but there is no question that the doctrine of lost grant applies equally to profits *a prendre*. In *Little* v. *Wingfield* (3) it was held to apply to a claim to a fishery in *alieno solo*; and on principle no distinction can be suggested as a ground for excluding any other sort of profit *a prendre* from its operation. I shall cite another case on this point presently.

In the present case no valid grant could have been made since the 6th May, 1848, when the Castledawson estate was put in settlement. But the evidence of open and continuous user as of right carried us back far beyond that date, so that

(1) Gale on Easements, 7th ed., p. 170, note (*k*).
(2) 6 A. C. 740. (3) 8 I. C. L. R. 279.

if there were nothing else in the case the presumption of a lawful origin, which could only be by some grant valid in law, would be irresistible.

What has caused my difficulty in the case is this. The lease of 1710 did not confer a title to the right claimed. For I cannot think that this incorporeal right had, before the date of the lease, become attached to the several holdings on the land demised by it so as to pass by the word "appurtenances." I think the presumption of this fails in point of proof. But the peculiar wording of the renewals, followed in the fee-farm grant, might have suggested a claim to do what is complained of under its terms: nay more, did so far suggest it that the defendants based their claim upon it when the matter came before Judge Ross on the settlement of the rental in Burrowes' estate. Their affidavit states as follows:—

"We say that in the fee-farm grant dated 17th September, 1851, which comprises the lands now held by us as tenants, there is a clause specially granting the right of turbary; and it is by virtue of this clause that we have exercised the right of turbary hitherto enjoyed by us. In accordance with the terms of the said lease we, as the tenants entitled thereto, have cut turf on the bog-lands of the estate; and as described in our former several affidavits, when the portion cut became exhausted, another portion was set apart for each tenant; and we say, each of us, that the said right of turbary has not been parted with by us. We each of us say for himself that the said right of turbary has been enjoyed without hindrance on the respective holdings now in our possession for the respective periods set opposite our names, during which time we have respectively resided on the said holding." Then follow the names of the deponents, with the number of years opposite each name.

Furthermore, I am satisfied that they or some of them really believed that their rights depended on some such circumstance, for though none of them assuredly ever saw the head-lease or renewals, it is astonishing how apparently ignorant country people sometimes get at obscure points of title superior to their own interests: often in a vague way, but sometimes with remarkable correctness. If this was a mistake by the tenant, it may

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have been one on the part of the owner of the Dawson estate also. James Mallon said that when Mitchell, the Dawsons' agent, was laying off the substituted bog for him he said: "You are bound to get it; you have a good lease." There were other expressions also, pointing in the same direction.

The question then arises whether, if what was done as of right, was done under a view of the law or of the facts which is not sustainable, that circumstance ought to prevent the presumption of another deed or deeds to validate what would otherwise be illegal, for, of course, if the presumption arises in this case, there is no difficulty in suggesting lawful means of giving effect to it. A grant to Hammersley in fee, in trust for each of the tenants occupying holdings on Anaghorish and Broaghmore, or a demise in the same terms as in the leases of 1711 and 1716, or a deed to remove doubts as to the construction of the renewals would be possible modes of so doing. Of course a grant in gross to all the inhabitants of the townlands could not be presumed; but if the principle is capable of application, there is no difficulty about the form. On this point *Goodman* v. *The Mayor of Saltash* (1) is conclusive.

Supposing, then, that the right claimed was by the parties referred to and believed to depend on a view now found to be erroneous, is that a bar to its assertion, if, but for that error, it would have been sustainable?

There is a very important case bearing on this question which I have consulted since the argument. It was not cited; I refer to *Earl De La Warr* v. *Miles* (2), which, though not a case of lost grant, was one dependent upon a sixty years' prescription and raised a question very similar to that before me, in which though there is no plea of sixty years' prescription, and though prescription by user from time immemorial is not applicable, though pleaded, yet an analogous principle applies.

In *Earl De La Warr* v. *Miles* (2) the acts done were supposed to have been justified by a right which did not exist. The action was by Lord De La Warr as lord of the manor of Duddleswell and owner of a portion of the soil of Ashdown Forest in Sussex,

(1) 7 A. C. 633. (2) 17 Ch. D. 535.

subject to rights of common therein, the extent of which was the question in dispute, to try the right asserted by the commoners to cut and carry away brakes, ferns, heather, and litter in the forest for the use of their tenements. The forest had been disafforested in the year 1677, and granted by the Crown to the Earl of Dorset, through whom the plaintiff claimed. The Crown had been the absolute owner of the soil of the forest. The tenants of the adjoining manors had customary rights of common of pasture, herbage, &c., but the Court Rolls and other documents contained no evidence of any customary rights in the commoners to cut and carry away from the forest brakes, ferns, and litter, except by permission of the forest officers.

In a suit instituted in 1691 to determine how much of the forest might properly be enclosed, having regard to the rights of common, the commoners claimed rights of pasturage and pannage for swine, and, as to such of them as had houses, certain quantities of fuel wood for their houses, but made no claim in respect of any other estovers. By the decree made in 1693, after allotting to the owners for enclosure and improvement portion of the forest as to which the commoners were to be excluded and debarred from any common of pasture, herbage, or pannage, the residue of the forest (containing 6400 acres) was allotted to remain open and unenclosed, "and the said defendants, their heirs, tenants, and assigns, and all other persons having right of common in the said forest, according to their respective interests therein, shall from time to time have and take the sole common pasturage and herbage, of all and every the lands allotted and left for common as aforesaid," the owners, their heirs and assigns, tenants, and farms being for ever excluded "from having or claiming any common of pasture or herbage upon or in the said lands so left for common as aforesaid." Lord De La Warr as owner of the inheritance having brought this action in 1878 to restrain one of the commoners from cutting and carrying away brakes, fern, and litter from the 6400 acres, for use upon the copyhold tenement in respect of which he had his right of common, the defendant claimed this right as one of the commoners entitled to the benefit of the decree of 1693, and also alternatively by prescription in respect of his particular tenement.

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It was held by Bacon, V.-C., and by the Court of Appeal (1) that the decree of 1693 did not include the right to cut and carry away the brakes, fern, heather, and litter growing on the 6400 acres; (2) that the existence at the date of that decree of any special custom authorizing the commoners to cut and carry away brakes, &c., and litter had not been established, and was negatived by the absence of any claim to such a custom by the commoners in the suit in which that decree was made; and (3) that evidence of usage after the date of the decree could not affect its construction. Bacon, V.-C., also held that the alternative claim to the alleged right of prescription in respect of the particular tenement being a claim of a profit *a prendre* in *alieno solo* could not be sustained. The Court of Appeal, however, held, that as the defendant and his predecessors in title were shown to have claimed to take, and to have actually taken, as of right and without any permission from the lord, litter from the 6400 acres for the use of the tenement for upwards of sixty years immediately before the action, they had under the Prescription Act acquired a right to do so, although they had claimed to do the acts complained of under the mistaken supposition that all the commoners were entitled to do them.

James, L.J., says, at p. 584: "In my opinion the defendant Mr. Hale has proved that for a period of sixty years he has claimed to be, and has taken, not by way of permission, not by way of concession on the part of the lord, but has taken as of right —that is to say, as a thing which he was entitled to do under some right or other—the litter from the forest to his farm for the use of that farm for the agricultural purposes for which litter would be used on that farm. That is what he has set up by the 15th paragraph of his defence, and it appears to me that he has suceeeded in proving distinctly that he has done so. Now, is that within the Prescription Act? It appears that if we were to hold that it was not, we should be repealing the Act, and what the Act was intended to legalize was a thing which had been done, as of right, for a sufficient period. It has been contended on behalf of the plaintiff that not only must it be shown to have been done as of right, but it must be shown to have been done under a claim of some right capable of being supported as valid by prescription, or grant, or custom; and that if the thing

was done under a claim to a right which could under no circumstances be a valid legal right, the thing would not be legalized by the Prescription Act. In my opinion that contention cannot be supported. It does not signify, as it seems to me, what was the nature of the claim made, provided the thing actually done was a thing a right to do which could have been legally granted to the man who was doing it, so that a right to do it could have had a legal origin. Now, the thing actually done, according to the evidence, is going to the forest to cut litter, not for the purpose of sale, but only for the purpose of being used on the farm to which that litter was carried. A right to do this could be legally claimed by prescription. If occupiers of the farm had been cutting litter for sixty years for purposes of sale, a claim under the Prescription Act of a right to do so being confined to one particular matter growing upon the common possibly might be supported. But we need not give any opinion on that, for the user here is confined to the taking of the litter to the farmyard, there to be used as litter. Then it is said, 'Yes, but you are doing this as one of a great body of persons.' Now there might have been something in that objection if what was done had been done by every inhabitant, and by everybody, so that you could not distinguish between what one inhabitant or person was doing from what the others were doing—that there was nothing which you could show as to the acts of the one which did not apply to the others. For instance, if the owner of a particular house in London shows that he and all the people who have lived in that house have for a long period gone every year to Hampstead Heath and run about the Heath, he cannot thereby establish a particular right, as annexed to that house, to go upon Hampstead Heath, when it is quite clear that he only went there like every other person who went from London to recreate himself there. But here it is quite manifest from all the evidence that there was a distinct right claimed, and a distinct right of a legal character claimed, by a particular class of persons, who could in law have taken that right, not *qua* class, not as a corporation or *quasi* corporation, but as a set of owners of particular tenements, every one of whom might have had a valid legal grant of such a right as is claimed

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by this defendant. It would not be a grant to a class; they are a class only because every one of them has got the same right. It is not a claim by custom. It is not a claim by a body of persons incapable of receiving such a grant, but a claim by each and every of a particular class of persons, each of whom is recognised and marked by being owner of a particular tenement as appurtenant to which he was claiming the right. There is nothing in point of law to prevent a grant of this kind, which might have been made if the lord had chosen to do it—'Whereas, certain persons have already got the right of sole common of pasture upon the land in respect of their farms, now I do grant to everyone of those same persons that, in addition to that right of common, each and every of them shall have the right of cutting litter thereon for the improvement of his farm.' That would have been a perfectly good valid grant, even if made by one general deed. Therefore there is nothing in the fact that this defendant was doing that which every other person in the same circumstances as himself was doing, and it does not derogate from his special right, that other persons in the same condition with himself was doing exactly the same thing." James, L.J., goes on: "Speaking as a juryman and a judge of fact, I am satisfied that Mr. Hale has proved that he and his predecessors in title did by themselves and their workmen for the whole period of sixty years required by the statute go upon the forest and cut litter and take it to be used on this farm." With regard to the decree, he says: "When we look at the object and the nature of the suit, the decree seems to me to be plain beyond all reasonable doubt. It appears to me that the meaning was perfectly plain, and that the commoners were to have, not any new common, not any new right in the herbage or pasturage, but that they were to have the enjoyment, as under the old right of common, of common of pasture and herbage in this spot, exclusive of the lord, sole as against the lord, but in common as between themselves; and that the lord was to be excluded from having any right of common with them in that spot." He comes to the conclusion that the defendant had failed in everything but the right set out in the 15th paragraph of his defence, but that he was entitled to the judgment of the Court upon that paragraph.

Brett, L.J., concurred. Cotton, L.J., at p. 596, says: "What we have to consider here is—first of all, whether the acts of the defendant have in fact been done by him and his predecessors in title for the period of sixty years. It is said that nearly all the persons who cut litter did it, not in respect of their own particular farms, but under a general supposition that the decree gave them a right to do so, or that there was some custom which justified it. In my opinion, as I have already said, it is not necessary under the statute that the acts done should at the time have been attempted to be justified in a way in which we think they can legally be justified, if the person doing them was claiming to do them as of right. What particular right the persons doing the acts alleged, unless there was permission from time to time given by the lord, in my opinion is not material under the statute. But, no doubt, it must be shown that the acts of the defendant are acts of user in connexion with his particular tenement, and that, I think, is shown, because what is proved in respect of this defendant and his predecessors in title is, that they cut the litter in respect of and for the use of their farm only; and as that was so, the right was exercised in respect of that tenement, and is connected with the tenement, *i.e.* with the possession and occupation of the tenement, and the ownership of the tenement." He then refers to some cases, and agrees that the decree of 1693 did not give the defendant the right he claimed.

I think these observations apply to the case before me, though the facts are not identical, and *mutatis mutandis*, lead to the conclusion that the defendants are entitled to claim a legal origin for an absolutely uninterrupted assertion of rights, extending over seventy years. There must be judgment for the defendants. The action is dismissed with costs.

W. L.

Appeal. Nov. 17.

The plaintiffs appealed to the Court of Appeal (1)

(1) Before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1902.

DAWSON v. M'GROGGAN.

Wylie, K.C., and *Gaussen*, for the appellants.

Gordon, K.C., *Bates, K.C.*, and *Kerr*, for the respondents.

THE COURT OF APPEAL affirmed the decision of the Master of the Rolls.

Solicitors for the plaintiffs: *Glover & M'Guckin.*
Solicitor for the defendants: *F. J. M'Keown.*

G. Y. D.

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March 19, 20, 21, 24. April 17. May 1.

M'ARDLE *v.* GAUGHRAN.

(1900. No. 14.)

Limitations, Statute of—Trust, express or constructive—Receipt of trust fund—Husband and wife—Trust for separate use—Fiduciary relation—Agency—Breach of trust—Accounting party—Rate of interest chargeable—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.

The wife of O. was entitled, under the will of her mother M., to a life interest for her separate use in a certain business and trade assets, with remainder on her death (in the events which happened) to the persons who would be beneficially entitled to her personal estate if she had died intestate and unmarried. The business and trade assets were vested in trustees under the will of M., and with their consent O. carried on the business for his wife as manager. The wife died in 1890. From 1890 till his death, in 1899, O. remained in possession, and dealt with the business and trade assets as if they were his own. He had full notice and knowledge of the trusts of the will of M. By his own will he left a legacy and a share of the residue of his estate to each of the persons who would have been sole next-of-kin of his wife, if she had died unmarried and intestate, coupled with a condition that each of them should execute a release of all claims he or she might have against the assets of M. under the provisions of her will:—

Held, that O. having retained possession of the business and trade assets after his wife's death, with full knowledge of the trust attaching thereto, and having dealt with the property as if it were his own, his estate was liable to the estate of M. without regard to lapse of time or the Statute of Limitations.

Held also, that, in exercise of the discretion of the Court, and under the circumstances of the case, four per cent. per annum should be allowed as the rate of interest chargeable against the estate of O. from his wife's death till

his own death, in respect of the amount invested in or represented by the furniture on the business premises and the stock-in-trade, and debts due to the business.

FURTHER CONSIDERATION.

By her will, dated the 29th March, 1848, Mary Dougherty devised and bequeathed all her real and personal property to trustees upon trust (after payment of two legacies) to raise and set apart out of her property the sum of £1000, and to invest and hold same on certain trusts as therein provided, and to hold all the rest, residue, and remainder of the property of the testatrix, exclusive of the two legacies previously mentioned and the sum of £1000, and inclusive of the stock-in-trade, debts, furniture, goods, and chattels owing or belonging to the testatrix at the time of her death, in trust for her daughter Maria O'Ferrall during her life for her separate use, and to allow her to carry on the trade in which the testatrix was at the date of her will or at the time of her death engaged, and to receive the profits thereof, and to manage, sell, order, and dispose of the premises and property, which for the time being should be engaged in the said trade, in all respects as if she were unmarried, and after her decease then in trust for such child or children of the present or any future marriage as appointed by Maria O'Ferrall, and in default of such appointment and subject thereto in trust for such child or children who should attain twenty-one or marry with consent, and if more than one in equal shares as tenants in common, and in case there should be no such child, then in trust for such uses, intents, and purposes as Maria O'Ferrall should by deed or will appoint, and subject thereto in trust for such person or persons as would be beneficially entitled in case Maria O'Ferrall had died sole and unmarried and intestate. The will directed that the trustees should procure to be done and carried on by the present or any future husband of Maria O'Ferrall, at the cost of the trust estates, all acts, deeds, matters, and things, etc., necessary to assure and secure the trust premises so that same should be at all times held and enjoyed according to the trusts thereof, and the will authorized the indemnifying of the husband of Maria O'Ferrall in

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respect of any expenses or losses he might incur in respect hereof.

Mary Dougherty carried on business as a grocer and spirit merchant in licensed premises in Kells. She died on the 18th December, 1857, and her will was duly proved. Her daughter Maria had married James O'Ferrall in 1845, and a settlement was executed on the marriage. On the death of Mary Dougherty James and Maria O'Ferrall entered into possession of the licensed premises in Kells previously occupied by the deceased, and carried on the business.

By deed, dated the 23rd May, 1868, made between James O'Ferrall of the first part, Maria O'Ferrall of the second part, the Rev. Patrick Kelly of the third part, and the Rev. Michael Fitzsimons of the fourth part, the Rev. Michael Fitzsimons was appointed a trustee of the will of Mary Dougherty in the place of the Rev. Michael Geoghegan. The deed, after reciting the will of Mary Dougherty, contained this recital:—"And whereas by and with the permission of the said trustees" (that is the trustees of Mary Dougherty's will) "the said Maria O'Ferrall took possession of the stock-in-trade, furniture, and goods and chattels of the said testatrix at the time of her death in and upon the house and premises in the town of Kells in pursuance of the trusts and directions of the said will, and the said Maria O'Ferrall has ever since by and with the advice and assistance of her said husband carried on, managed, and conducted the said trade and business, and the proceeds and profits thereof have been applied according to the trusts of the said will, and the said James O'Ferrall is not liable or answerable for any portion thereof, same having been applied and used for the use and benefit of the said Maria O'Ferrall, and in carrying on said trade and business, and in providing and renewing, from time to time as occasion required, the goods, matters, and stock-in-trade thereof." The deed also recited the intention of carrying on the business according to the trusts, and appointed the Rev. Michael Fitzsimons a trustee of the will of Mary Dougherty in place of the Rev. Michael Geoghegan, deceased. The deed further provided that the trustees (so far as empowered by the will) thereby authorized Maria O'Ferrall to

continue to carry on and manage the business as theretofore, and James O'Ferrall and Maria O'Ferrall (the husband covenanting for the wife) covenanted that the trade and business should be carried on in pursuance of the trusts and purposes of Mary Dougherty's will.

Maria O'Ferrall died the 22nd March, 1890, intestate and without issue, and without having made any appointment.

During his wife's lifetime James O'Ferrall carried on the business and managed the property for her or her trustees. After the death of his wife in 1890 he continued in possession of the licensed premises, and carried on the business for his own benefit.

By his will, dated the 28th December, 1893, James O'Ferrall bequeathed certain legacies to nephews and nieces of his wife who were her sole next-of-kin, and after reciting the will of Mary Dougherty, and after other legacies, he devised and bequeathed his real and personal estate, "including the dwelling-house, shop, and premises now in my possession, and the furniture, stock-in-trade, book and other debts due in respect of the business carried on in said premises," and also a sum of stock, on trust to convert into money, and after payment of debts and legacies, to divide the residue among the nephews and nieces of his wife and other specified persons, and after reciting that in the events which had happened he might not be entitled to the property and funds, subject to the trusts of the will of Mary Dougherty, or the income thereof, and included in the property disposed of by his will, but that the nephews and nieces of his wife as her next-of-kin might be entitled to claim same, he provided that the legacies and shares of the residue given and bequeathed to the nephews and nieces of his wife were given on the express condition that they and all other (if any) persons who might be entitled under the will of Mary Dougherty to any part of the property subject to the trusts of her will should (if required) release and indemnify the executors and trustees of his will from all claims in respect of the real and personal estate of Mary Dougherty.

James O'Ferrall died the 3rd July, 1899; and on the 22nd January, 1900, an order was made for the administration of his

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estate. An order was subsequently made for the administration of the estate of Mary Dougherty, and by subsequent order the two suits were consolidated.

The matter came before the Court on further consideration of the Chief Clerk's certificate.

The principal question arising for decision was as to whether the estate of James O'Ferrall was liable to the estate of Mary Dougherty, for the occupation of the licensed premises in Kells, and to account for the business carried on therein from the death of his wife Maria O'Ferrall on the 22nd March, 1890, to July 3rd, 1899, the date of his own death, that is for a period of over nine years, or for a period of six years only.

The sum of £3174 was found, by the Chief Clerk's certificate, to be the amount, which, at the date of the death of Maria O'Ferrall, remained invested in the furniture and stock-in-trade in the business premises in Kells, and in the debts due to the business, and it was agreed between the parties that the amount so invested was the same at the date of the death of James O'Ferrall. The question as to what rate of interest on this sum was chargeable against the estate of James O'Ferrall also came before the Court for consideration.

O'Connor, K.C., W. H. Brown, and *Morgan Byrne*, for Patrick M'Ardle, the plaintiff in the first action, and one of the next-of-kin of Maria O'Ferrall. They contended that, on the facts shown, James O'Ferrall was in possession of the assets of Mary Dougherty, as a trustee, and that, therefore, being in the position of a trustee holding on express trusts, his estate was bound to account for the whole period of his occupation since his wife's death, because in such a case his liability was not restricted to six years, as section 8 of the Trustee Act of 1888 (51 & 52 Vict. c. 59) did not apply.

As to the rate of interest chargeable against the estate of James O'Ferrall, they said it was a matter for the discretion of the Court, but that the circumstances of the case were such that five per cent. interest should be allowed.

Ignatius J. O'Brien, K.C., and *Littledale*, for Michael O'Ferrall

and other legatees under James O'Ferrall's will. They contended that James O'Ferrall never entered into possession of the assets of Mary Dougherty as a trustee, but was merely manager for his wife, with the consent of the trustees of Mary Dougherty's will. That being so in possession of the assets, he continued on in the premises after his wife's death; and that never having been either expressly or constructively a trustee, he was entitled to rely on the Statute of Limitations, and that consequently the liability of his estate should be limited to an account for six years.

They also contended that interest at the rate of three per cent. per annum only should be allowed by the Court, in exercise of its discretion, on the sum of £3174, being the value of the furniture and stock-in-trade in the business premises, and the debts due to the business.

Molony, K. C., for the executors of the will of James O'Ferrall.

W. G. Jefferson and *F. Greer*, for legatees under the will of James O'Ferrall.

[The following cases were referred to:—*Soar* v. *Ashwell* (1); *Wassell* v. *Leggatt* (2); *Barney* v. *Barney* (3); *Barnes* v. *Addy* (4); *Burdick* v. *Garrick* (5); *Banner* v. *Berridge* (6); *Watson* v. *Woodman* (7); *Lee* v. *Sankey* (8); *Lyell* v. *Kennedy* (9); *Myler* v. *Fitzpatrick* (10); *Rich* v. *Cockell* (11); *Rolfe* v. *Gregory* (12); *Gray* v. *Bateman* (13); *Morgan* v. *Stephens* (14); *Lake* v. *Bell* (15); *Bridgman* v. *Gill* (16); *Thorne* v. *Heard* (17); *Life Association of Scotland* v. *Siddal* (18); *Stone* v. *Godfrey* (19).]

(1) [1893] 2 Q. B. 390.
(2) [1896] 1 Ch. 554.
(3) [1892] 2 Ch. 265.
(4) L. R. 9 Ch. 244.
(5) L. R. 5 Ch. 233.
(6) 18 Ch. D. 254.
(7) L. R. 20 Eq. 721.
(8) L. R. 15 Eq. 204.
(9) 14 A. C. 437.
(10) 6 Madd. 360.
(11) 9 Ves. 369.
(12) 34 L. J. Ch. 274.
(13) 21 W. R. 137.
(14) 3 Giff. 226.
(15) 34 Ch. D. 462.
(16) 24 Beav. 302.
(17) [1895] A. C. 495.
(18) 3 D. F. & J. 58.
(19) 5 De G. M. & G. 76.

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May 1.

THE MASTER OF THE ROLLS (having referred to the will of Mary Dougherty, and the deed of 23rd May, 1868), said:—

Maria O'Ferrall died 22nd March, 1890, without issue, intestate, and without appointing. Therefore the fund, consisting of the entire residuary estate of Mary Dougherty, was then distributable under her will, and James O'Ferrall was perfectly aware of this. He did not die till July 3rd, 1899, but he made his will on 28th December, 1893, less than four years after his wife's death. [His Lordship referred to the will.] There can be no doubt that so long as he lived he carried on the trade without accounting; and dealt with the portion of Mary Dougherty's assets, over which he had, in fact, control, as if it was his own, but under the obligation to account when and if required.

When his wife died in 1890, James O'Ferrall ceased to have any interest whatever in the property comprised in Mrs. Dougherty's will. Indeed, he never had any legal interest in it, though living with his wife, and carrying on the business and managing the property for her or her trustees. It appears by the deed of 1868, to which he was a party, that he had been in the habit of receiving the income, and that his receipt of it was deemed justified because it was expended for his wife's benefit. No doubt, this state of things continued down to 1890. But then came the change. From that time on he in effect ignored the provisions of Mrs. Dougherty's will, and dealt with her assets as if they were his own. He knew, however, that this was wrong, and in his will left considerable legacies and a share of his residue to the beneficiaries under her will, coupled with the condition that they should execute releases of all claims founded upon it. The deed appointing a new trustee also shows that he had the most full and complete notice of the contents of Mary Dougherty's will, and of his position in relation to her assets. He was rightfully in possession up to his wife's decease. Of course, after that his possession would necessarily continue for a time till the trustees relieved him of it, which they did not do, and it continued till his own death. That he was an express trustee, as that word is as usually understood, may not be clear; but in my opinion it is at any rate clear that he was a trustee by implication, that is, a constructive trustee, and liable to account as such. He retained property which was

bound by a trust, with full knowledge of the trust. He had no claim and made no claim to it by any adverse title or pretence of title. Having got the property by virtue of his position, he must perform the trust with which he knew it was clothed. His management, so long as it was lawful, was under the lawful trustees and really on their behalf. This is abundantly clear from the indemnity clause in the deed of 1868, and also from the passage in his own will which I have read. From the latter, too, it appears that from 1890 on his position in this respect was unaltered, he never repudiated the title of the trustees or of their *cestuis que trustent*, but, on the contrary, tried to buy off the latter by providing for them under his will certain benefits conditionally on their surrendering what he knew to be their rights under Mary Dougherty's will.

Under these circumstances, the case falls within the principle of such cases as *Soar* v. *Ashwell* (1), where it was held that there was an express trust, and *Lyell* v. *Kennedy* (2), in both of which the previous authorities were exhaustively reviewed.

In *Barnes* v. *Addy* (3) Lord Selborne says:—"Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*."

In *Lee* v. *Sankey* (4), Bacon, V.-C., said:—"It is established that a person who receives into his hands trust moneys, and who deals with them in a manner inconsistent with the performance of trusts of which he is cognizant, is personally liable for the consequences which may ensue from his so dealing," that is, he becomes a trustee *de son tort*.

In *Barney* v. *Barney* (5), before Kekewich, J., the persons sought to be held liable as constructive trustees had not the

(1) [1893] 2 Q. B. 390.
(2) 14 A. C. 437.
(3) L. R. 9 Ch. 244, 251.
(4) L. R. 15 Eq. 204, 211.
(5) [1892] 2 Ch. 265.

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possession, and, the learned Judge held, never had control over the fund.

In *Wassell* v. *Leggatt* (1) a husband had by force seized and kept personal property left by a will to his wife for her separate use; and Mr. Justice Romer held him to be a trustee for her. That, at first sight, seems a strong decision; but it is plainly correct, for the Married Women's Property Acts did not apply to the case (the marriage was in 1854), and at law the money when reduced into possession by the husband was his, but bound in equity by a trust for his wife's separate use which had attached to the legacy when it became payable. He was therefore her trustee, and never ceased to be so. It was simply the case of a trustee making away with the trust property.

I can entertain no doubt that in the present case James O'Ferrall, being rightfully in possession of the fund in 1890 by the consent of the trustees, and as their agent, providing an indemnity for them, and so retaining possession and control of the fund, made himself a trustee, though only a constructive trustee of it, and his estate is liable on that basis.

If so, the Statute of Limitations is no answer to the claim against his assets. Section 8 of the Trustee Act of 1888 (51 & 52 Vict. c. 59), which enables trustees to rely on a period of limitation, does not apply when the trustee retains the trust property or its proceeds. If, therefore, James O'Ferrall was a trustee, there is nothing in the Act to restrict his liability to six or any other number of years; and I have decided that he was.

Under the circumstances, I think I am justified in saying that interest at four per cent. per annum is chargeable against the estate of James O'Ferrall from the date of his wife's death to the date of his own death.

"THE COURT ordered that the Chief Clerk's certificate be 'varied by finding that the estate of James O'Ferrall, deceased, is liable to the estate of Mary Dougherty, deceased, for the occupation of the licensed premises in Kells, &c., from the death of Mrs. O'Ferrall on 22nd March, 1890, to the 3rd July, 1899, the date of the death of the said James O'Ferrall. . . . And it appearing to the Court

(1) [1896] 1 Ch. 554.

that the sum of £3174 0*s.* 11*d.* was the amount which at the date of the death of the said Mrs. O'Ferrall remained invested in the furniture and stock-in-trade in the business premises in Kells, and in debts due to said business, and all the said parties by their said counsel agreeing that the amount so invested was the same at the date of the death of the said James O'Ferrall, it is ordered that the said certificate be also varied by finding that the estate of the said James O'Ferrall is liable to the estate of the said Mary Dougherty for interest at the rate of four per cent. per annum upon the said sum of £3174 0*s.* 11*d.* from the death of the said Mrs. O'Ferrall to the death of the said James O'Ferrall.'"

Solicitor for the plaintiff M'Ardle: *J. H. Callan.*
Solicitors for Michael O'Ferrall and others, legatees: *Scallan & Co.*
Solicitor for the executors of James O'Ferrall: *J. Clark.*
Solicitor for other parties: *A. Henry.*

R. W. L.

O'DONNELL *v.* WELSH.

(1902. No. 1029.)

Will—Construction—Specific bequest—Insufficient description—Ambiguity—Legatee—Right of selection.

A testator by will bequeathed "twenty Northern Bank shares" to a legatee. At the date of his death the testator was possessed of fifty-one "A" Northern Bank shares of the value of £26 each, and seventy-two "B" Northern Bank shares of the value of £13 each:—

Held, that the legatee was entitled to select twenty of the "A" shares as constituting her legacy.

By his will, dated November 13th, 1895, John Welsh devised and bequeathed his real and personal estate not thereby otherwise disposed of to the trustees of his will upon certain trusts, and "as to twenty Northern Bank shares upon trust to pay the income thereof to my granddaughter for her life, so that if and while she shall be under coverture, the same shall be for her sole and

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separate use, and she shall not have power to dispose of the same by way of anticipation, and after her death to pay such income to such person or persons, and in such shares as my said granddaughter shall by any deed or will appoint, and in default of such appointment, and so far as any such appointment shall not extend, for her children in equal shares, but should my said granddaughter die without issue, then on the trusts upon which my residuary estate is held."

John Welsh died 19th May, 1899, and probate of his will was granted to the plaintiffs, the executors and trustees of the will.

At the date of his death John Welsh was possessed of fifty-one "A" Northern Bank shares and seventy-two "B" Northern Bank shares. The "A" shares were, at the date of the will and at the time of testator's death, value for about £26 each, and the "B" shares value for about £13 each.

The plaintiffs issued an originating summons under Ord. LV., Rule 4, asking for determination of the following questions :—

1. Whether, according to the true construction of the will of John Welsh, the bequest to plaintiffs of twenty Northern Bank shares upon trust for the defendant Mary Welsh was void for uncertainty ?

2. If the bequest in the will of the Northern Bank shares was not void for uncertainty, what Northern Bank shares, forming portion of the assets of the deceased, should be appointed by plaintiffs in satisfaction of said bequest ?

3. How the costs of and incidental to the application should be borne ?

The defendant Mary Welsh, granddaughter of the testator, and so referred to in his will, was a minor, aged fifteen. The defendant Mrs. Gallagher, widow, was residuary legatee.

Henry, K.C., for the plaintiffs, submitted the questions for decision.

Wylie, K.C., for the residuary legatee, cited *Richardson* v. *Watson* (1); *Jacques* v. *Chambers* (2); *Millard* v. *Bailey* (3).

(1) 4 B. & Ad. 787. (2) 2 Coll. 435. (3) L. R. 1 Eq. 378.

Bartley, for Mary Welsh:—

If a testator bequeaths a number of articles forming part of a stock of the same description the legatee has the right of selection. The same rule applies to shares in a company: Williams on Executors and Administrators (9th ed.), p. 1303; *Tapley* v. *Eagleton* (1); *Jacques* v. *Chambers* (2); *Duckmanton* v. *Duckmanton* (3).

THE MASTER OF THE ROLLS:—

The general principle in these cases is that the Court leans against giving a construction to a will which would result in holding that there is such confusion in the language used by a testator that the gift would be void for uncertainty. That result did arise in *Richardson* v. *Watson* (4); (a decision criticised by Sir George Jessel in *Tapley* v. *Eagleton* (1)), where a testator had two closes, and devised one close to a grandnephew in words which were critically correct as applied to either of them, and it was held that it was not intended that there should be a choice by anyone. But the general rule is that if it is plain on the will itself that there must be a selection made in order to carry out the intention of the testator it is the legatee who makes it; as in the case of a bequest of six horses, when the testator has twenty in his stable, with nothing to show which horses the legatee is to have, yet the testator must have intended that some one should choose, and there is no one to do so but the legatee.

The same principle applies to a gift of stock as to a gift of horses; and it is plain in this case that the testator knew that some one must make a selection. He had fifty-one "A" Northern Bank shares and seventy-two "B" Northern Bank shares in his possession and standing in his name at the time of his death. He had therefore 123 Northern Bank shares, and of these he disposed of twenty in favour of the legatee by the bequest now in question. It must be assumed that he knew he had other shares than those he disposes of, and he says, in effect, "I give twenty shares of 123 which I have"; and if there were nothing more it would be

(1) 12 Ch. D. 683.
(2) 2 Coll. 435.
(3) 5 H. & N. 219.
(4) 4 B. & Ad. 787.

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simply a case where the testator had some "A" shares and some "B" shares of the Northern Bank, more than sufficient of each class to feed the legacy, all of the Northern Bank shares equally answering to the description. Who, then, is to make the selection? Just as in ths case of horses in a stable, so in the case of shares in the books of a company, the legatee must have the power of selection. On general principle this is clear; and the cases cited are exactly in point. In *Jacques* v. *Chambers* (1) there was no difference between the classes of shares in question, but there was a difference in the incidents attached to the different portions of the class of shares, some of which were subject to an *onus* which the rest were free from, and were thus different in substance like the "A" and "B" bank shares in the present case. *Millard* v. *Bailey* (2) is a similar case, where there was a bequest of thirty-three shares in a gas company in which the testatrix held seventy-four, thirty-seven of which were original paid up shares and thirty-seven new shares not wholly paid up; and it was held that the legatee had the right to select.

I therefore think that the legatee in this case (who is a minor) has a power of selection; and as counsel on her behalf instructed by her guardian *ad litem* states that it is, and as it appears to the Court quite manifestly to be, for her benefit to take twenty of the "A" shares, there will be a declaration, without any reference, that she is entitled to twenty of these £26 shares as constituting her legacy.

Solicitor for the plaintiffs: *M. Maguire.*
Solicitor for the residuary legatee: *P. M. Gallagher.*
Solicitor for Mary Welsh: *C. Friery.*

R. W. L.

(1) 2 Coll. 435.

(2) L. R. 1 Eq. 378.

IN RE JORDAN'S TRUSTS.

(1902. No. 1016.)

V.-C. 1903. Jan. 19.

Will—Executory trust—Direction to settle—Possibility of issue.

A testator bequeathed *inter alia* two legacies of £300 to Mary M. and Elizabeth M. respectively, for their own sole and separate use, free from the control of any husband they might marry; said legacies not to be payable by the trustees and executors of his will until a settlement, to be approved of by them, should be made in reference to same. The testator died in 1866. The legatees never married, and had attained the ages of seventy-five and seventy years respectively. No settlement had ever been executed, and the money was retained in the hands of the trustees:—

Held, that, under the circumstances, the legatees were entitled to have the legacies paid over to them by the trustees without any settlement.

ADJOURNED SUMMONS.

By his will Christopher Jordan devised and bequeathed all his property of every nature to James Mathews and Finlay Chester, whom he appointed his executors and trustees, upon the trusts and to and for the several intents and purposes thereinafter mentioned; and *inter alia* he gave and bequeathed to Mary M'Enello and Elizabeth M'Enello the sum of £300 each for their own sole and separate use, said legacies to be free from the control of or liability to the debts of any husband they or either of them might intermarry with; and said legacies not to be payable by the said trustees and executors of said will to the said Mary M'Enello and Elizabeth M'Enello until settlement upon each of them, to be approved by said trustees and executors, should be made in reference to same.

The testator died on the 15th February, 1866, and his estate was subsequently administered by the Court.

By an order of the Court, dated 22nd June, 1869, it was ordered that as much Government stock as at the price of the day would be equivalent to the sums of £323 14*s.*, respectively representing the original legacies and interest which had accrued due

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In re JORDAN'S TRUSTS.

thereon, should be transferred to the said trustees in trust for Mary M'Enello and Elizabeth M'Enello on foot of the said legacies bequeathed to them; and the said two sums were accordingly transferred into the names of the trustees.

James Mathews died on the 5th April, 1875, and Finlay Chester died on the 3rd October, 1891.

By an order, dated 23rd June, 1902, Patrick James Kieran and Patrick M'Enello were appointed trustees of the will of Christopher Jordan in relation to the said two legacies of £300 in place of the original trustees, and the right to call for a transfer and to transfer into their own names the stock representing the sums transferred into the names of the original trustees by the order of 22nd June, 1869, was vested in them.

In pursuance of the said order of 23rd June, 1902, two sums of £352 6*s.* 5*d.* consols representing the original legacies of £300, and the interest which had accrued due thereon prior to the date of the order of 22nd June, 1869, were transferred into the names of Patrick James Kieran and Patrick M'Enello.

Mary M'Enello and Elizabeth M'Enello were both unmarried, and had attained the ages of seventy-five and seventy respectively.

The present summons was taken out by Patrick James Kieran and Patrick M'Enello to have the question determined, whether or not they were at liberty to pay over to Mary M'Enello and Elizabeth M'Enello respectively the sums now representing the legacies without a settlement.

Macrory, for the trustees.

Oulton, for the legatees:—

Where the testator is dealing with land he employs the word "issue," but in the case of legacies he does not refer to issue at all. The will therefore imports an absolute gift of the legacies: *Magrath* v. *Morehead* (1). The present case is distinguishable from *Duckett* v. *Thompson* (2). There the money was not to be paid until marriage. Even if a settlement were otherwise necessary, it is no longer so owing to the advanced ages of the legatees, possibility of issue being extinct: *Lyddon* v. *Ellison* (3).

(1) L. R. 12 Eq. 491. (2) 11 L. R. Ir. 424. (3) 19 Beav. 565.

THE VICE-CHANCELLOR held that the legatees, under the circumstances, were entitled to have the sums, respectively representing the legacies, paid over to them without any settlement.

V.-C. 1903.

In re JORDAN'S TRUSTS.

Solicitor for the trustees and legatees: *Charles Mac Mahon.*

J. MAC M.

ORFORD *v.* ORFORD.

V.-C. 1903.

(1902. No. 1014.)

Feb. 19.

Will—Construction—Gift, whether to class or personæ designatæ.

A testator, among other legacies, gave the sum of £200 to each of his three sisters, whom he named, and devised his farm, with all household furniture, &c., in the dwellinghouse and live stock, &c., subject to their mother's life interest therein, to his "said three sisters," or such of them as should survive him, in equal shares, as tenants in common. The testator bequeathed the residue of his property to a charitable institution. By a codicil he revoked the legacy of £200 given to one of his sisters, and also the bequest in remainder to her of a share in the farm, &c., and in other respects confirmed his will. Testator's mother and three sisters survived him:—

Held, that the bequest of the farm, &c., under the terms of the will, passed to the sisters, not as members of a class, but as *personæ designatæ*, and that consequently the revoked share fell into the residue.

ADJOURNED SUMMONS.

By his will, dated 2nd January, 1901, William Orford, of Carna, Simcroft, Co. Kildare, after appointing Owen Conlon and Patrick Talbot executors and trustees of his will, bequeathed the sum of £200 to each of his three sisters, Kate, Theresa, and Anne, whom he expressly named. The will likewise contained the following bequest:—"I give my farm at Carna, on which I reside, together with all household furniture and other effects (other than money or securities for money) in the dwellinghouse, and all live and dead farming stock and implements of husbandry, of which I shall be possessed at my death, unto my said trustees, in trust for my mother during her life, and after her

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ORFORD v. ORFORD.

death in trust for my said three sisters, or such of them as shall survive me, in equal shares as tenants in common."

The testator bequeathed all the residue of his property, after payment of debts, &c., to the Hospital for Consumptives, Newcastle, Co. Wicklow. By a codicil to his will, dated 6th January, 1901, the testator revoked the legacy of £200 given to his sister Theresa, and he also revoked the bequest to her of a share in the farm, &c., in the following terms :—"I also revoke the bequest in remainder after the death of my mother given by my said will to my said sister Theresa of a share in my farm, household furniture and effects, and farming stock, and in all other respects I confirm my said will." Testator died on the 5th September, 1901, and the executors named in his will having renounced probate, letters of administration were on 7th May, 1902, granted to Bridget Orford, the testator's mother.

The present summons was taken out by Bridget Orford to have the question determined, whether the bequest in remainder of the farm and farming stock was a bequest to the three sisters as members of a class, in which case the revoked share would pass to the other two sisters, or whether they took as *personæ designatæ*, in which event the revoked share would fall into the residue.

Donaldson, for the administratrix.

Oulton, for the residuary legatees :—

The question is whether the testator's sisters take as members of a class or as individuals. In the case of tenants in common the rule is that their shares in case of revocation fall into the residue unless it can be shown that the testator contemplated their taking as a class: see Jarman on Wills, vol. ii., page 1128; *Creswell* v. *Cherly* (1); *Boulcott* v. *Boulcott* (2); *Ramsay* v. *Shelmerdine* (3). In the present case the testator first bequeathed a legacy to his three sisters whom he named, and the gift of the farm is to his "said three sisters" in equal shares as tenants in common. Consequently they take as individuals. The fact that the original number of

(1) 2 Ed. 123. (2) 2 Drew. 25. (3) L. R. 1 Eq. 129.

individuals has been reduced makes no difference: *In re Smith's Trusts* (1); *Stansfield* v. *Stansfield* (2).

D. Kehoe, for the legatees and devisees, Kate Orford and Anne Orford:—

It was clearly the intention of the testator to separate the farm from the rest of his property, and set it apart for the members of his family. He gives the farm to persons who were all united by a common tie, and it would be absurd to suppose that the testator contemplated giving a share in it to a public institution. The sisters clearly were intended to take as a class. [He cited *M'Kay* v. *M'Kay* (3); *Kingsbury* v. *Walter* (4).]

Oulton, in reply:—

If the testator had not named the devisees, but merely referred to them as his sisters, there might be force in Mr. Kehoe's argument. In *M'Kay* v. *M'Kay* (3) the gift was to "children," and in *Kingsbury* v. *Walter* (4) to "A and the child or children of his sister B." These cases are thus clearly distinguishable.

The VICE-CHANCELLOR held that under the will the testator's sisters took the farm and farming stock, &c., as *personæ designatæ*, and not as a class, and that consequently the revoked share fell into the residue.

Solicitors for the administratrix: *Brown & M'Cann.*
Solicitors for the residuary legatees: *Orpen & Sweeny.*
Solicitor for Kate and Anne Orford: *T. C. Ross.*

J. MAC M.

(1) 9 Ch. D. 117.
(2) 15 Ch. D. 84.
(3) [1900] I. R. 213.
(4) [1899] 2 Ch. 314; [1901] App. Cas. 187.

Ross, J.
1902.
Oct. 30.

IN THE MATTER OF THE ESTATE DEVISED BY THE WILL AND TESTAMENT OF MARIE S. BURTON, DECEASED, TO GUILLEMORE O'GRADY, OWNER; AND IN THE MATTER OF THE LEGAL PRACTITIONERS (IRELAND) ACT, 1876, H. STUART MOORE, PETITIONER.

Land Judge's Court—Practice—Petition for a charging order under the Legal Practitioners (Ireland) Act, 1876.

Where a solicitor, employed on behalf of the owner of an estate for sale in the Land Judge's Court, claimed to have preserved the property, and the estate was subsequently taken out of Court, and the owner refused to pay the costs incurred by his solicitor, the Land Judge allowed a petition by the solicitor under the Legal Practitioners (Ireland) Act, 1876, to be received and filed.

MOTION *ex parte*, that the petition presented by Mr. H. Stuart Moore, solicitor, under the provisions of the Legal Practitioners (Ireland) Act, 1876, be received and filed. The petition set out that under the will of Marie S. Burton, dated the 10th of April, 1889, Guillemore O'Grady was entitled for life, with remainder to his first and other sons in tail, to certain real estates in the county Clare and in the city of Limerick; and that under a codicil dated the 31st of December the lands were settled on Charles Vereker in the event of Guillemore O'Grady dying without issue. After the death of the testatrix a petition was filed to have the real estate devised by her will sold, which petition was entitled—"In the matter of the estate of Guillemore O'Grady, a minor, by Edward Stamer O'Grady, M.D., his guardian *ad litem*, owner; *Ex parte* Richard Stackpoole, petitioner." Mr. H. Stuart Moore, who had acted for many years as solicitor for Edward Stamer O'Grady, the father and next friend of Guillemore O'Grady, was retained by him to act on behalf of Guillemore O'Grady, who was then an infant, and acted for him from 1891 to 1894, with the result that the Receiver was discharged, and the petition dismissed. In 1894 Edward Stamer O'Grady discharged the retainer of Mr. Moore, who thereupon furnished his bill of costs, amount-

ing to £165 17*s.* 8*d.*, and a further bill of costs, incurred by him in the Land Judge's matter, amounting to £40 8*s.* 7*d.*, was furnished in 1902, to the executor of Edward Stamer O'Grady, who had died in the meantime. Mr. Guillemore O'Grady attained the age of 21 years in 1898. Mr. Moore made frequent application to him for payment of these costs, but he repudiated all liability thereto. The prayer of the petition, which it was sought to have filed, was as follows:—"I. That it may be declared that your petitioner, as solicitor employed by the said Edward Stamer O'Grady, the guardian and next friend of the said Guillemore O'Grady in the prosecution of the said matter, is entitled to a charge upon the interest of the said Guillemore O'Grady, of and in the said hereditaments and premises situate at Carnally, in the baronies of Island and Bunratty, in the county of Clare, and certain premises in the city of Limerick, in Ireland; and of and in any other property recovered by or preserved for the said Guillemore O'Grady in the said matter, as the solicitor for the said Guillemore O'Grady. II. That it may be referred to the Taxing Master to tax such costs as between solicitor and client, including therein the costs, charges, and expenses of your petitioner, of and in reference to this matter; and also including the costs of your petitioner, of and relating to this application. III. That the amount of such taxed costs, charges, and expenses may be raised by a sale of the estate and interest of the said Guillemore O'Grady in the said hereditaments and premises, and other such property as aforesaid, and may be paid to your petitioner, or for such other order, &c."

Gerald Fitz Gibbon, on behalf of Mr. Moore:—

This, which appears to be the first application in this Court under the 3rd section of the Act, is a proper petition to be received and filed. The proper way to bring forward the claim is by petition: see Daniell's Chancery Forms, 1901, page 1036; *Brown* v. *Trotman* (1); *Baile* v. *Baile* (2). It is intituled, not in the original matter, which is now out of Court, but in the new matter.

(1) 12 Ch. Div. 880. (2) L. R. 13 Eq. 437.

Ross, J. 1902. *In re* BURTON'S ESTATE.

Ross, J.:—

I shall allow this petition to be received and filed. The title is correct, as the former matter has been dismissed out of Court. Notice of motion, founded on the petition, in the terms of the prayer, must be served on Mr. O'Grady, and the motion will then come into the list for hearing in the regular course.

Solicitors for the petitioner: *Moore, Keily, & Lloyd.*

W. C. S.

M. R. 1902. July 4, 8.

IN RE WOODHOUSE'S TRUSTS.

Settlement—Construction—Design—Wife's property—Ultimate trust for next-of-kin of wife—"Die unmarried"—Widow's settlement.

By settlement executed prior to the second marriage of M. (then a widow) a fund, which was her property, was assigned to trustees, in trust for herself for life for her separate use, with power of appointment after her death. In default of appointment the income was to be paid to W. (the intended husband) for life, and after his death the principal was to go to such child or children of M. by W., or by her former husband, in equal shares, as should be living at the death of W. In case there should be no child or other issue of M. entitled under the previous provisions of the settlement, there was an ultimate trust in favour of "such person or persons as would, under the Statute of Distributions, be entitled to the personal estate of M., in case she had died intestate and unmarried."

M. did not exercise the power given to her by the settlement. She had no child by W. She had one son by her first marriage, who survived her, but died before W., without leaving issue:—

Held, that "unmarried," in the ultimate trust of the settlement meant "*discovert* at the time of death," and that consequently the representatives of the deceased son of the first marriage were entitled to the fund.

ADJOURNED SUMMONS.

By indenture of settlement, dated 18th August, 1853, executed prior to her marriage with George Woodhouse, Mary Cairns Fisher (then the widow of Stewart Fisher) assigned a sum of £400 to trustees in trust for herself until the marriage then in contemplation, and after solemnization thereof, in trust to invest said sum and pay her the income thereof for her life for her sole and separate use, without power of anticipation, and after her death to pay over the said principal sum with any interest thereon to and amongst such person or persons as Mary Cairns Fisher should by deed or will appoint, and in default of appointment to

pay the income of said sum to George Woodhouse (if he survived Mary Cairns Fisher) for life, and after the decease of the survivor and in default of appointment as aforesaid upon trust to divide and pay over the sum of £400 to the child or children (if more than one in equal shares) of Mary Cairns Fisher who should be living at the death of George Woodhouse, whether such child or children were by him, or by her former husband Stewart Fisher. There was a proviso that in the event of the death of any such child in the lifetime of George Woodhouse, leaving issue living at George Woodhouse's death, such issue should be entitled to the share the parent would have taken had he or she survived George Woodhouse. The ultimate trust was as follows:—

"And in case there shall be no child or children or other issue of the said Mary Cairns Fisher, either by the said George Woodhouse, or by her former husband Stewart Fisher, who would, under the provisions aforesaid, be entitled to the said sum of £400 and interest due thereon, then upon trust to pay over the said principal sum, &c., to such person or persons as would, under the Statute of Distributions, be entitled to the personal estate of the said Mary Cairns Fisher, in case she had died unmarried and intestate."

Mary Cairns Woodhouse (formerly Fisher) died November 5th, 1877, without making any appointment under the settlement of 1853 of the sum of £400. She had no child by her marriage with George Woodhouse, but she had by her former marriage one child, Stewart Fisher, who died on 12th August, 1889, without issue, leaving his widow, Mrs. Elizabeth Fisher, surviving him. George Woodhouse died 8th March, 1898.

The next-of-kin of Mary Cairns Woodhouse, formerly Fisher, living at her death (excluding her son Stewart Fisher) were Robert Reade, Richard Reade, and Mary Carleton, children of a deceased brother, and Mrs. M. A. Black, the only child of a deceased sister.

Robert Reade died intestate and unmarried in 1884, and letters of administration of his personal estate were granted to his brother Richard Reade. Richard Reade died intestate and unmarried 12th July, 1898, and letters of administration of his personal estate were granted to his sister Mary Carleton. Mary Carleton died 9th August, 1898, intestate, and administration of her personal estate was granted to her only daughter and sole next-of-kin, Katherine Carleton.

No representation had been taken out to Stewart Fisher, and an order was made by the Master of the Rolls, appointing Mr. Baker

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to represent Mrs. Fisher, the widow of Stewart Fisher; and he directed that she should be declared representative of her husband's interest (if any) in the fund in Court without the necessity of raising representation to him.

The present application was made to the Court for distribution of the fund in Court subject to the trusts of the settlement of 1853, now represented by a sum of £436 17*s.* 10*d.* Consols, and £48 17*s.* 6*d.* cash.

The question arising for determination was as to who were entitled to this fund under the ultimate trust contained in the marriage settlement of 18th August, 1853, as regards the wife's fortune.

Bartley, for Mrs. Black:—

The widow of Stewart Fisher is not entitled to share in this fund, because her husband never could have been one of the next-of-kin of Mrs. Woodhouse supposing her to have died unmarried; and even assuming that he could have come within the definition in the ultimate trust, he was not alive at the moment of George Woodhouse's death, which is the time fixed by the settlement for the ascertainment of the class.

The fund goes as if Mrs. Woodhouse had died a spinster. There is no reason why the words "die unmarried" in this settlement should not bear their ordinary meaning: *Dalrymple* v. *Hall* (1); *In re Sergeant* (2); *Emmins* v. *Bradford* (3); *Hardman* v. *Maffett* (4); *In re Deane's Trusts* (5).

There is no context here which necessitates a different construction, as was the case in *Wilson* v. *Atkinson* (6). That case lays down no general principle of construction.

The time for distribution of the fund is fixed by the settlement, that is on the death of the husband, when the next-of-kin are to be ascertained. That is the plain construction. The meaning is clear and unambiguous—the class is *then* to be ascertained: *Bullock* v. *Downes* (7); *Re Morley's Trusts* (8); *Clarke* v. *Hayne* (9); *Miller* v. *Eaton* (10); *Re King's Settlement*; *Gibson* v. *Wright* (11).

(1) 16 Ch. D. 715.
(2) 26 Ch. D. 575.
(3) 13 Ch. D. 493.
(4) 13 L. R. Ir. 499.
(5) [1900] 1 I. R. 332.
(6) 4 D. J. & S. 455.
(7) 9 H. L. Cas. 1.
(8) 25 W. R. 825.
(9) 42 Ch. D. 529.
(10) G. Coop. Rep. 272.
(11) 60 L. T. (N. S.) 745.

Consequently Mrs. Black is entitled to one-third of the fund in Court, as being one of the three next-of-kin of Mrs. Woodhouse at the date of her husband's death.

Even if the Court decides that Stewart Fisher was entitled under the ultimate trust in the settlement, his widow can only claim one moiety of the fund, because her husband died previous to the coming into operation of the Intestates' Estates Act of 1890. The other half belongs to the next-of-kin of her husband, of whom Mrs. Black is one.

C. Brady, for the widow of Stewart Fisher :—

The representatives of Stewart Fisher, the son of the first marriage, are entitled to this fund.

The primary meaning of "die unmarried" in a widow's settlement is "die without leaving a husband," or "not having a husband at the time of death." The words are to be construed as meaning "without having married her then intended husband," *i.e.* without having contracted the second marriage, which was in contemplation at the time of the settlement. The intention of a trust of this kind is that in default of issue, and subject to the life interests therein, the wife's property should go as if she left no husband surviving her: Davidson's Conveyancing, vol. iii., part 1, p. 191; Key and Elphinstone's Conveyancing, p. 482; Vaizey on Settlements, p. 1254; *Maugham* v. *Vincent* (1); *Hoare* v. *Barnes* (2); *Pratt* v. *Mathew* (3); *Re Saunders' Trusts* (4); *Re Norman's Trusts* (5).

In the settlement now in question there can be no implication that "unmarried" is equivalent to "spinster." It would be a strange perversion of words if "unmarried" in a widow's settlement must *prima facie*, and without context, mean "without ever having been married." It naturally, in a settlement of the kind, means "discovert" or "being a widow at the time of death." The context can, of course, control the interpretation: *Clarke* v. *Colls* (6); but there is no context here adverse to the natural construction. An ultimate limitation of this sort is designed to

(1) 4 Jur. 452.
(2) 3 Br. Ch. Cas. 316. [522.
(3) 22 Beav. 328; 8 DeG. M. & G.
(4) 3 K. & J. 152.
(5) 3 DeG. M. & G. 965.
(6) 9 H. L. Cas. 601.

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exclude the husband. It has not the effect of excluding a child: *In re Ball's Trusts* (1); *Upton* v. *Brown* (2); *In re Arden's Settlement* (3). Why should a child be excluded in favour of collaterals; or for what reason should the child of a third marriage be excluded? A trust for the next-of-kin ought not to be construed so as to exclude children. See observations of Turner, L.J., in *Wilson* v. *Atkinson* (4), at p. 461 of the report. *Stoddart* v. *Saville* (5) follows *Wilson* v. *Atkinson* (4). The time to ascertain the class is at the date of the death of Mrs. Woodhouse: *Wheeler* v. *Adams* (6); *Bullock* v. *Downes* (7); *Re Saunders' Trusts* (8); *Mortimore* v. *Mortimore* (9).

In re Deane's Trusts (10) does not govern this case. The words there were, "without having been married." There, as was pointed out in the judgment, there was "elaborate and careful provision for the two deceased children of the marriage" who were held to be excluded from participation in the fund in question. The result was arrived at on the general context of the settlement, and the case is distinguished from *Wilson* v. *Atkinson* (4). See pp. 340, 341 of the report.

Moreover, this case is really covered by the decision of the Court of Appeal in an unreported case of *Riky* v. *Warren* (11), where a fund belonging to the wife was put in settlement, and there was (amongst other things) a proviso that in case there should not be any issue of the marriage living at the death of the husband (which event happened), then the trust fund should go as the wife should appoint, and in default thereof to such person or persons "as in case of her death intestate and unmarried would have been her next-of-kin entitled to her personal estate." There was no appointment, and it was held by the Court of Appeal, reversing the decision of the Lord Chancellor, that the word "unmarried" in the settlement meant "not under coverture" (12).

(1) 11 Ch. D. 270.
(2) 12 Ch. D. 872.
(3) [1890] W. N. 204.
(4) 4 D. J. & S. 455.
(5) [1894] 1 Ch. 480.
(6) 17 Beav. 417.
(7) 9 H. L. Cas. 1.
(8) 3 K. & J. 152.
(9) 4 A. C. 448.
(10) [1900] 1 I. R. 332.
(11) Unreported.
(12) See also *In re Mare; Mare* v. *Howey*, since reported in the authorized reports, [1902] 2 Ch. 112. But see *Smith's Settlement; Wilkins* v. *Smith*, [1903] 1 Ch. 373.—[Rep.]

Herbert Wilson, K.C., for Miss Carleton:—

Reading the cases of *Pratt* v. *Mathew* (1) and *Clarke* v. *Colls* (2) together, the law is clear that in every case of a settlement where the expression "die unmarried" is used, the words are of flexible meaning, which amounts to this: that you must go to the settlement in question itself to ascertain whether a particular construction is to be adopted, and whether a particular class is to be excluded or included in the expression. It is clear that this case excludes the construction contended for by Mr. Brady. The trusts on which the fund of £400 are settled were prepared with care, and are different from those in *Riky* v. *Warren* (3). It is a different case. It is clear that in this case "die unmarried" must be construed to mean "die a spinster." The next-of-kin in the ultimate clause does not include those (the lineal descendants) who are mentioned in the previous clause, but is an artificial class of next-of-kin, which class is to be ascertained in the ordinary way on the death of Mrs. Woodhouse: *White* v. *Springett* (4). You have to look to the settlement to see what the artificial class is which it creates. Stewart Fisher is excluded. That is the design of the settlement as framed. At the time of the death of the *propositus* the next-of-kin were Robert Reade, Richard Reade, and Mary Carleton (all of whom we represent), and Mrs. Black. We are consequently entitled to three-fourths of the fund in question.

Bartley, in reply:—

The settlement in *Riky* v. *Warren* (3) is different from that in the present case. The period of distribution is different. Each settlement rests on its own provisions as regards construction: *Clarke* v. *Colls* (2). "Dying unmarried" is undoubtedly capable of the same meaning as "dying without having been married": *In re Watson's Trusts* (5).

As to when the next-of-kin of Mrs. Woodhouse are to be ascertained, it is clear that the class is to be found at the death of George Woodhouse: Jarman on Wills, pp. 989, 990; *Smith* v. *Smith* (6). The distribution takes place at the particular time

(1) 22 Beav. 328.
(2) 9 H. L. Cas. 601.
(3) Unreported.
(4) L. R. 4 Ch. 300.
(5) 55 L. T. (N. S.) 316.
(6) 12 Sim. 317, at pp. 326, 327.

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fixed by the settlement, that is on the death of the husband. Mrs. Black is consequently entitled to one-third of the funds in question, because at the date of George Woodhouse's death the three living next-of-kin within the terms of the settlement were Richard Reade, Mary Carleton, and herself (Mrs. Black).

July 8.

The Master of the Rolls:—

The principal question in this case depends upon the meaning to be assigned to the word "unmarried" in the settlement of 18th August, 1853, executed on the occasion of the marriage of Mary Cairns Fisher with George Woodhouse.

By that instrument a sum of £400, the property of Mary Cairns Fisher, was put in settlement, and the trusts were "to pay over the interest, dividends, and annual produce thereof so often as the same shall accrue due thereon to the said Mary Cairns Fisher for her sole and separate use; and so that she shall not in any manner alien or anticipate the same or any part thereof, and in no wise subject to the debts, control, or engagements of said George Woodhouse, her said intended husband, during the term of her natural life on her separate receipt, and from and immediately after the death of the said Mary Cairns Fisher, then upon trust to pay over the said principal sum of £400, together with any interest that may be then due thereon, to and amongst such person or persons in such shares and proportions and subject to such restrictions, limitations, and provisoes as the said Mary Cairns Fisher shall notwithstanding her coverture by any deed or instrument in writing under her hand and seal or by her last will and testament . . . direct or appoint; and in default of such appointment upon trust to pay the interest, dividends, and annual produce arising from said sum of £400 to said George Woodhouse in case he shall survive his said intended wife during the term of his natural life; and from and after the decease of the survivor of them the said George Woodhouse and Mary Cairns Fisher, in case the said Mary Cairns Fisher shall have neglected to execute the power of appointment hereinbefore given her in that behalf, upon trust to divide, distribute, and pay over the said sum of £400 and all interest due thereon to the child, if only one, or amongst the

children, if more than one, of her the said Mary Cairns Fisher who may be living at the death of the said George Woodhouse, not only the children of the said Mary Cairns Fisher by the said George Woodhouse, but by her former husband, Stewart Fisher, share and share alike. Provided always that in case any of said children shall die in the lifetime of the said George Woodhouse leaving children or grandchildren living at the death of the said George Woodhouse, then and in such case such children or grandchildren shall take and be entitled to the share, that such child of the said Mary Cairns Fisher would have been entitled to in case such last-mentioned child had survived the said George Woodhouse; and in default of such appointment as aforesaid, and in case there shall be no child or children or other issue of the said Mary Cairns Fisher either by said George Woodhouse or by her former husband Stewart Fisher, who would under the provisions aforesaid be entitled to the said sum of £400 and interest thereon, then upon trust to pay over the said principal sum and all interest due thereon to such person or persons as would under the Statute of Distributions be entitled to the personal estate of the said Mary Cairns Fisher in case she had died intestate and unmarried."

Mrs. Fisher was a widow at the time of this (her second) marriage, and had then living one child, Stewart Fisher, by her first husband. There were no children of the second marriage. She died 5th November, 1877, without exercising the power of appointment over the fund. George Woodhouse, her husband, died on the 8th March, 1898. Stewart Fisher died suddenly at Leeds on the 12th August, 1889, as appears by a coroner's inquisition held upon his body, in which his age is stated as being fifty-five. If this be correct (very likely it is only approximately so), he would have been about nineteen at the date of the settlement in question.

No representation has been taken out to him; but in answer to advertisements and inquiries which I directed his widow has come forward, and I appointed her provisionally to represent his estate and argue the question. The other claimants are persons who would have been next-of-kin of Mrs. Woodhouse if Stewart Fisher had not survived her, or if he were illegitimate. Their contention is that the word "unmarried" in its context means the

M. R. 1902.

In re Woodhouse's Trusts.

case of her death intestate and unmarried, would have been as her next-of-kin entitled to her personal estate."

The case was first heard before the Lord Chancellor (Lord O'Hagan), and he decided and declared that "the next-of-kin of Mrs. Anne Swan, otherwise Riky, ... at the time of her decease, supposing her never to have been married," and the representatives of such of them as were then deceased were entitled to the fund; that is, he treated "unmarried" in that settlement as equivalent to without ever having been married, using almost the very language which occurred in the settlements in *Hardman* v. *Maffett* (1), and *Deane's Trusts* (2), each form of expression being an assumption contrary to the fact. But there was an appeal, which was heard in November, 1870, by the Lord Chancellor himself, Christian, L. J., and Deasy, B., and the decree was reversed in January, 1871, having stood for judgment, the Court holding that the word "unmarried" meant, in the settlement in question, "not under coverture," and *not* "supposing her never to have been married." It is strange that the case does not seem to have been reported; but the decree and the order of the Court of Appeal are before me, as well as the settlement; also an affidavit of Mr. James Searight Atkinson, filed in the Court of the Land Commission, setting out the facts connected with the title in *Riky* v. *Warren* (3).

Mr. Bartley sought to distinguish that case from the present, and no doubt there are points of verbal distinction between them. But they are substantially the same; and I do not feel called upon to be astute to detect small differences, especially as my own view of the settlement of 1853 is in accordance with that of the Court of Appeal in reference to that of 1830. The latter instrument contains a recital of an intention effectually to secure Anne Riky's property to her and her issue, in order to make a provision "for her and for her children, if any, of the intended marriage," but this intent underlies all marriage settlements.

Solicitor for Mrs. Black: *W. Martin.*

Solicitor for Mrs. Stewart Fisher: *A. F. Baker.*

Solicitors for Miss Carleton: *Bennett Thompson & M'Laughlin.*

R. W. L.

(1) 13 L. R. Ir. 499. (2) [1900] 1 I. R. 332. (3) Unreported.

IN THE MATTER OF THE ESTATE OF AUGUSTUS W. WEST, OWNER AND PETITIONER.

Ross, J.
1902.
March 3
Appeal.
April 16.

Landlord and tenant—Land Purchase Acts—Redemption of superior interests —Refusal of the owner of superior interest to appoint an arbitrator— Jurisdiction of the Land Judge to decide the dispute.

Where the owner of a superior interest ordered to be redeemed refuses to appoint an arbitrator, the Land Judge can, under section 5 of the schedule to the Landlord and Tenant Act, 1870, decide the dispute and fix the price.

APPLICATION on behalf of the owner, under section 5 of the schedule to the Landlord and Tenant Act, 1870, that a dispute which had arisen between him and the Marquis of Clanricarde as to the appointment of an umpire for the purpose of fixing the redemption price of a superior interest which had been ordered to be redeemed, might be decided by the Land Judge, and the redemption price ascertained by him.

The facts were: the lands for sale were held (with others) under the Marquis of Clanricarde under a fee-farm grant, dated the 2nd March, 1852, subject to the fee-farm rent of £132 10*s.* 8*d.* By an order of the Land Judge this fee-farm rent was apportioned, and £93 was put on the lands for sale. The solicitors for the owner asked the Marquis of Clanricarde's solicitor to consent to a price as the redemption price of this apportioned rent, but he refused. The solicitors for the owner then called upon the solicitor for Lord Clanricarde to appoint an arbitrator, under Order XX., Rule 13, of the Rules of March, 1897, which he refused to do. The matter came on for hearing on the 9th December, 1901, when Lord Clanricarde was not represented by counsel, and his solicitor stated he was instructed to consent to nothing. At that hearing Mr. Justice Ross held that he was given jurisdiction to fix the price, under the circumstances which had arisen, and fixed it at twenty-six years' purchase. Subsequently application was made by counsel for Lord Clanricarde

M. R. 1902.

In re WOODHOUSE'S TRUSTS.

same as "supposing her never to have been married." The phrase "without having been married," will, as a rule, bear its natural and grammatical meaning, unless the meaning is displaced by a context, as was the case in *Wilson* v. *Atkinson* (1), where it was clear that it could not be used in that sense, by reason of a direction that an illegitimate daughter should be deemed to be, for the purpose of the settlement, a lawful child, while on the strict construction of the clause she would have taken nothing at all, even if legitimate. The words there had to be interpreted as meaning "without having been married to Richard Wilson Simpson." And no doubt whatever the words used, the clause is usually intended to exclude the *jus mariti*, though where the children and remoter issue of the marriage are elaborately provided for by carefully framed limitations, and where there is no circumstance to suggest mistake, or to show that the strict construction (as in *Wilson* v. *Atkinson* (1)) could not have been intended, it must prevail. This is the rule of construction which applies to all documents. I have considered the cases so fully in *Hardman* v. *Maffett* (2) and in *Deane's Trusts* (3), in both of which the words were "without having been married," that I shall not pursue the subject further at present, for the word here is "unmarried," and not "without having been married."

At first sight there does not seem much difference between the expressions. It would, however, be not incorrect to say of a widow that she was unmarried at the time of her death, while it would be untrue to say that she died without having been married. In short, "unmarried" is, as was pointed out by the Lord Chancellor in the House of Lords, in *Clarke* v. *Colls* (4), a word of flexible meaning.

Now, what is its meaning in the settlement before me? The lady had a son grown up, though not of age. In construing an instrument, where the word used is the flexible one, "unmarried," it is surely right to give it that meaning which would not, in the event which happened, send the fund belonging to a married woman to collaterals, and away from her own son, unless that meaning be forbidden. When I say "away from her son" I

(1) 4 De G. J. & S. 455.
(2) 13 L. R. Ir. 499.
(3) [1900] 1 I. R. 332.
(4) 9 H. L. Cas. 601.

mean that in the supposed event he could not have made a marriage settlement which would have been effective in case of his leaving no issue, nor could he have otherwise dealt with the reversion subject to his stepfather's life estate. If it can be construed as meaning "not married to a husband whose marriage with her was in contemplation when the settlement was drafted"—unmarried to Woodhouse, in fact—that construction should prevail.

But I need hardly speculate on this, because the very point appears to have been decided in the case of *Riky* v. *Warren*, in the Court of Appeal, in this country, in 1871. The industry of Mr. Brady has unearthed this decision, which is not reported, and I have been furnished with a copy of the settlement.

As in the present case, the question arose in reference to a fund of the wife, which was put in settlement, and after most careful limitations the ultimate clause was as follows: — "Provided always further, that in case no appointment shall have been made in pursuance of the powers to the said Benjamin Swan and Anne Riky, hereinbefore limited, and in case there shall not be any issue of the said intended marriage living at the time of the death of the said Benjamin Swan, or born in due time after his decease, whether the said Benjamin Swan shall die in the lifetime of the said Anne Riky, or after her decease, or in case there be issue thereof living at the time of the death of said Benjamin Swan, or born in due time after his decease, and that all such issue shall afterwards die, if a son or sons, before the age of twenty-one years, and without lawful issue, or if a daughter or daughters, before the age of eighteen years, and without lawful issue, then and in such case, and in either of said events, all the said trust funds and other property, sum and sums of money as aforesaid, and hereinbefore mentioned, shall go, and remain, and be paid over, and transferred by the said Benjamin Riky and Sandham Symes," the trustees of the settlement, "or the survivor of them, and the executors, administrators, and assigns of such survivor in such manner as the said Anne Riky, notwithstanding her coverture, shall by any written instrument, or by her last will and testament, direct and appoint; and in default of such direction and appointment, to and for the sole use and benefit and behoof of the said Anne Riky, if then living, or if then dead, of such person and persons as in

Ross, J. 1902.

In re West's Estate.

to have the matter reheard and argued by counsel, to which the Judge consented.

Jellett, K.C. (with him *Stritch, K.C.*), for Lord Clanricarde :—

The Court cannot fix the redemption price in this case. The jurisdiction of this Court is merely statutory. Under the Landlord and Tenant Act of 1870, sect. 25, provision is made for the reference of the dispute to an arbitrator or arbitrators to be appointed in manner appearing by the schedule to that Act. Section 5 of the schedule provides that if after the service of the request, by one party on the other, to appoint an arbitrator, the party served fails to appoint one, then upon such failure the party making such request may apply to the Court, and thereupon the dispute shall be decided by the Court according to the provisions of that Act. A question may arise as to what the Court in that paragraph means; but section 11 shows that the Civil Bill Court is pointed to. We assume that that is so, as the Court of arbitration was not constituted at that time. Section 16 (3) of the Land Law (Ireland) Act, 1887, empowers the Land Commission to order the redemption of a rent, or the apportioned part of it, at a price to be fixed by agreement between the parties, or to be determined by the Land Commission, if the parties consent that the Land Commission should determine it, or if they do not consent, to be settled by arbitration in the manner provided by section 25 of the Act of 1870 and the schedule to that Act. In the preceding section, section 15, the Land Commission are empowered to order the redemption of any crown-rent, quit-rent, or tithe rentcharge at a price to be fixed by themselves, and that section contains no mention of arbitration.

Section 20 of the Purchase of Land (Ireland) Act, 1891, provides that where any tithe rentcharge, annuity, rentcharge, or rent, or any apportioned part thereof, is ordered to be redeemed, pursuant to the provisions of the Act of 1887, the Land Commission shall have the same powers in respect to the redemption thereof as are contained in section 14 (1) of the Act of 1887; and that the provisions of section 16 of that Act shall apply to any superior rent affecting the tithe rentcharge or rent, or to any fee-farm grant or lease reserving the same.

Section 31 (3) of the Land Law (Ireland) Act, 1896, provides that the powers of apportionment and redemption given to the Land Commission by section 10 of the Purchase of Land (Ireland) Act, 1885, and sections 15 and 16 of the Land Law (Ireland) Act, 1887, shall extend to superior interests.

Sub-section (4) provides that where a holding is sold by the Land Judge to the tenant thereof, and an advance under the Land Purchase Acts is made, the Land Judge shall have the powers of apportionment and redemption conferred on the Land Commission by sections 15 and 16 of the Act of 1887, and section 20 of the Act of 1891, as if the Land Judge were the Land Commission.

Sub-section (5) provides that the price or compensation to be paid in respect of a superior interest, or any apportioned part thereof, shall be determined in the manner provided by the said sections for the redemption of annuities, rentcharges, and rents.

Now sub-section (3) gives no jurisdiction to this Court to make the order asked for. Sub-section (4) only deals with the power of apportionment and redemption, and there is not a word in it as to "price." This is important when you come to sub-section (5). In that sub-section there is nothing about the Land Judge. The Act could have provided for the substitution of the Land Judge for the Land Commission under section 16 of the Act of 1887 and the Act of 1870; but this was not done; it merely gives him the power of apportionment and redemption, but no other power. This is clear from the fact that the "price" is dealt with separately, and sub-section (5) alone deals with it. In certain events the Land Commission have the power only vested in the Civil Bill Court; and *quoad* apportionment and redemption, a new jurisdiction is given to the Land Judge; but as to price, it is to be regulated by the other Act. The latter clause of sub-section (5) refers to sub-section (4), and the consideration of the price does not. [Ross, J.:—Who then have the power to fix the price?] The Land Commission. The Land Commission, and not the Land Judge, is put in the position of the Civil Bill Court.

Ross, J.
1902.

In re WEST'S ESTATE.

G. W. Walker, for the owner:—

Lord Clanricarde's object is to prevent the carrying out of the sale. He asked 33⅓ years' purchase, which is excessive.

Sub-section (4) of section 31 of the Act of 1896 puts the Land Judge in the same position *quoad* apportionment and redemption as the Land Commission was placed in by the Act of 1887, which incorporates the Act of 1870. This power of apportionment and redemption means all the powers under these heads under sections 15 and 16 of the Act of 1887, and includes all ancillary powers, including that of fixing a "price." It is said that the power of fixing the "price" is not included, because it is included in sub-section (5); but sections 15 and 16 of the Act of 1887 deal with annuities, rentcharges, and rents, and sub-section (3) enlarges those powers so as to embrace superior interests, which are fully defined in sub-section (8), and which have to be redeemed. Sections 15 and 16 alone would not have been sufficient to provide for the mode of ascertaining the price of several of these superior interests.

Stritch, K.C., in reply:—

The only way in which the dispute can be decided is provided by section 25 of the Act of 1870, and the consent of both parties is essential.

Ross, J.:—

I am of opinion that the decision which I arrived at on the previous occasion was correct, although I had not the advantage of the elaborate argument which has been presented to me by counsel for Lord Clanricarde.

It is against common sense that such a state of things should exist as is suggested, that a sale is to be had here, free from superior interests, but that redemption cannot be effected without sending the case back to the Land Commission to fix the price. I must, however, deal with this technical argument.

Sections 15 and 16 of the Act of 1887 deal with the apportionment and redemption of certain annuities and charges. Under the Act of 1896 we find these sections remain unrepealed, while

provision is made for the extension of the powers of redemption, not merely of charges and annuities, but of "superior interests," a considerably wider class. The statutory power of apportionment and redemption given to the Land Commission as to the smaller class is extended to all superior interests. We find that when a holding is sold by the Land Judge the power of apportionment and redemption, given by the Act of 1887, is conferred on him in like manner as if the Land Judge were the Land Commission; that is, in interpreting the section, you are throughout to substitute Land Judge for Land Commission. I am therefore clearly of opinion that the grounds suggested by Lord Clanricarde's counsel are unsustainable, and I refuse the motion with costs.

W. C. S.

Appeal.
April 16.

Lord Clanricarde appealed to the Court of Appeal (Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.).

Stritch, K.C., Jellett, K.C., and *Hynes*, for the appellant.

Wakely, K.C., and *Walker*, for the owner.

THE COURT OF APPEAL affirmed the decision of Ross, J., and dismissed the appeal with costs.

Solicitors for the owner: *St. George & Browne.*
Solicitor for Lord Clanricarde: *C. Graham.*

R. D. M.

Ross, J.
1902.
Jan. 12.

IN THE MATTER OF THE ESTATE OF JAMES BLAQUIERE, TRUSTEE FOR SALE OF THE ESTATE OF EDWARD MULCHINOCK, OWNER; EX PARTE JAMES BLAQUIERE, PETITIONER.

Landlord and tenant—Land Purchase Acts—Redemption of liability for rent out of estate indemnified therefrom—Form of order providing for future payment of the proportion of the rent so redeemed in case where an incumbrancer is not paid in full.

Where the incumbrancers are not paid in full the form of order in *In re Kennedy's Estate* ([1902] 1 I. R. 364) should be varied by declaring the first unpaid incumbrancer entitled to the proportion of the rent redeemed, subject to redemption by the mortgagor. A petition for the sale of the proportion of the rent will be allowed to be filed.

MOTION on behalf of the owners that Graves Chamney Swan, the first incumbrancer who was unpaid, might be declared entitled to the annual sum of £39 6*s.* 8*d.* apportioned part of a fee-farm rent of £120 0*s.* 6*d.*, under section 33 (4) of the Land Law (Ireland) Act, 1896. The facts were as follows:—The lands of Glenbonniffe, being portion of the lands for sale in this matter, were subject, with the lands of Corbeagh and other lands, to a yearly rent of £120 0*s.* 6*d.*, reserved by a fee-farm grant, dated the 21st of July, 1862. The lands of Glenbonniffe were sold in the Landed Estates Court in 1868, subject to this fee-farm rent, but indemnified therefrom by the lands of Corbeagh, which were sold as bound to indemnify all the other lands therefrom. The lands of Glenbonniffe were sold in this Court under sect. 40 of the Land Law (Ireland) Act, 1896, and by an order of the 9th of June, 1902, the fee-farm rent was apportioned, and £39 6*s.* 8*d.* was put in the lands of Glenbonniffe; and this annual sum was redeemed out of the purchase-money. Mr. Graves Chamney Swan was the first unpaid incumbrancer for the sum of £1000; and there was not sufficient money in Court to pay him in full.

H. D. Conner, K.C., for the owner.

G. W. Walker, for Mr. Swan.

P. O'Byrne, for the owner of Corbeagh.

Ross, J., made an order, which, after reciting the liability to the rent, the order for apportionment and redemption, the existence of the indemnity, and that Mr. Swan was the incumbrancer unpaid, proceeded in the curial part as follows:—

> "IT is ordered and declared by the Court, in pursuance and under the authority of the Land Law (Ireland) Act, 1896, section 33, subsection 4, that the perpetual yearly rentcharge or annual sum of £39 6*s.* 8*d.* is well charged and chargeable upon the said lands of Corbeagh, containing 1042A. 2R. 12P. statute measure, situate in the barony of Upper Tulla and county of Clare, and that the said yearly rentcharge or annual sum is payable to and receivable by the said Graves Chamney Swan, his heirs and assigns, half-yearly, on every 1st day of May and every 1st day of November, in every year, with a proper apportioned part for the period from the 21st day of July, 1902, to the 1st day of November, 1902, but subject to redemption on payment to the said Graves Chamney Swan, his executors, administrators, or assigns, of all sums for the time being due for principal and interest on foot of an indenture of mortgage, dated the 12th day of June, 1879, and made between Edward Mulchinock of the one part, and Graves S. Eves, William B. Homan, and Anna J. Swan of the other part, being incumbrance No. 8 in the second part of the final schedule of incumbrances in the matter; and it is further ordered that the owner in the matter be at liberty to file a petition for the sale in this Court of the said perpetual yearly rentcharge or annual sum of £39 6*s.* 8*d.* so charged as aforesaid upon the said lands of Corbeagh."

Solicitors for the owner having carriage: *Bowles & French.*
Solicitor for Mr. Swan: *Beauchamp.*
Solicitor for the owner of Corbeagh: *T. O'Meara.*

W. C. S.

Ross, J.
1903.
Jan. 21, 29.

In the Matter of the Estate of EDWARD RICKARD LLOYD, Owner; Ex parte P. HILL, Petitioner.

Merger—Intention—Examination of all the circumstances of the case.

A, being entitled to an estate for life in the lands of B, subject to (among others) a first incumbrance for £900, and a charge for younger children, with power to mortgage, purchased the incumbrance, which was conveyed to a trustee for him. He mortgaged the lands subject to the charges. By his will he directed certain other lands to be sold for the purpose of paying off the charges and incumbrances on the lands of B; and he empowered his trustees, during the minority of his son (to whom he devised the lands of B, and bequeathed his residuary personal estate), to apply the surplus rents of all the lands, and also to sell his personal estate, and apply the proceeds thereof, for the same purpose. By a codicil he increased the amount of the charge for younger children:—

Held, that the charge of £900 merged.

Motion to vary an order fixing priorities.

The facts appear fully in the judgment. The Rev. Rickard Lloyd had, under his marriage settlement, a power of mortgaging the settled lands.

Gerald FitzGibbon, for the incumbrancer having carriage:—

The charge of £900 is still alive. It was conveyed to a trustee for the purpose of keeping it alive. The *onus* of displacing it lies on the objector.

C. Brady, for Miss Hill and Mr. Guy Lloyd, the trustees of the settlement of Anne D. Lloyd, No. 15 B on the Schedule:—

The charge is merged, and the facts all point in that direction. When the two mortgages came to be executed by the Rev. Rickard Lloyd he made no reference to the old charge, and gave a mortgage to a puisne incumbrancer. Then see how he deals with the matter in his will. [Counsel read the will, stated *infra*, p. 149.] He gives the residue of his personalty and realty, with power to apply it in discharge of incumbrances, and makes no reference to the charge; the object of the testator was that the devisee should have the estate

free from incumbrances. Again, he directs his real and personal estate to be sold to pay off the incumbrances. He makes a codicil to his will in 1856, and he charges the lands with £1000 for younger children. What was the effect of giving this further charge on the lands if he owned the fee-simple and the old charge? At the date of his death was the old charge existing or not? If it existed, then it was captured by the codicil; but it was then, it is submitted, merged in the estate. See the observations of Monroe, J., in *In re Roche's Estate* (1) :—"There can be no doubt but that if an owner conveyed all his interest in lands, on which he was entitled to a charge, the charge as against the grantor, though not specifically mentioned, would vest in the grantee." Again, in *Mackesy* v. *Mackesy* (2), a devise of "all my estate and interest in the lands of A" was held to pass the beneficial interest in a mortgage belonging to the testator. The direction to pay charges out of all the testator's real and leasehold estate includes this charge, secured by a term. In *Lysaght* v. *Lysaght* (3) the intention to merge was held to be ambulatory. See also *Swinfen* v. *Swinfen* (4); *In re Nunn's Estate* (5); and the judgment of FitzGibbon, L.J., at page 300; and *In re Godley's Estate* (6). Whether merger takes place or not is a matter of intention, either expressed (which it is not here) or presumed by the Court in certain cases (which it is not here), or can be found, as in the present case, from the circumstances attending the transactions and acts of the testator.

Take the facts:—(1) The testator did not use the charge in 1848 or 1849; (2) he never did any act during his lifetime which showed that he believed it to be subsisting; (3) he never mentioned it in his will. What is the effect of this? See *Grice* v. *Shaw* (7); *Hood* v. *Phillips* (8). (4) He gives £6000 to his younger children, which he must be held to have intended to be paid, and it cannot be said that he intended to give his son the power of cutting down this £6000 by £900. Did the testator believe that his son would have that power as a mere residuary legatee? The testator either believed the estate was of sufficient

(1) 25 L. R. Ir. 58, at p. 73.
(2) [1896] 1 I. R. 511.
(3) 4 Ir. Jur. 110.
(4) 29 Beav. 199.
(5) 23 L. R. Ir. 286.
(6) [1896] 1 I. R. 45, at p. 51.
(7) 10 Hare, 76.
(8) 3 Beav. 513.

Ross, J. 1903.

In re LLOYD'S ESTATE.

value to pay the £6000 or he did not; if he did believe it, there was no necessity to give the £900 charge to his son because he took the estate; if he did not believe it then it would be absurd for him to pretend to give the younger children the £6000. (5) In the will he directs his trustees to pay the interest on the incumbrances; to sell the lands of Meldrum to pay off incumbrances; to apply the personal estate in paying off incumbrances, with power to them to mortgage his estates to pay off charges. The meaning of this was that the estate should go to his son freed from incumbrances, and this is inconsistent with the belief that the charge of £900 was still alive, or that he intended it to go to his son as personal estate. (6) The only indication which could be argued to be an intention to keep it alive was the interposition of a trustee, a mere conveyancing act. But the mere assignment to a trustee does not prevent merger: *Hood* v. *Phillips* (1); *Pitt* v. *Pitt* (2); *Astley* v. *Milles* (3); Lewin on Trusts (1891), p. 825. (7) When the trustees raised money after his death they did not use this old charge, which, if alive, would have been the best security to offer to a lender. The son, for the first time, uses it in 1872; but that could not revive it, if dead. Further, no interest has ever been paid on it, and the Receiver, in 1887, was not directed to pay it.

Fitz Gibbon, in reply:—

The mortgages of 1848 and 1849 were made, as therein recited, under a power in the will, and subject to incumbrances, and there is a covenant for further assurance, "save as aforesaid." It made no difference that at the date of the mortgages the charge was in the mortgagor, as the power to mortgage was subject to charges; and if the mortgagee wanted this security he could have called on the mortgagor to convey it to him. The mortgages by the executors and trustees were also under the same power. *Mackesy* v. *Mackesy* (4) does not apply, as here there was no conveyance of all the estate and interest of the mortgagor; see also *Kilkelly* v. *Powell* (5). It is submitted:—(1) That it is clear that the

(1) 3 Beav. 513.
(2) 22 Beav. 294.
(3) 1 Simon, 298.
(4) [1896] 1 I. R. 511.
(5) [1897] 1 I. R. 457.

mortgages were made subject to this charge; (2) the recitals show that the charge is alive; and (3) the fact that the charge was not referred to in the will is beside that question, as the mortgages were created under the power in the settlement. The facts in *Swinfen* v. *Swinfen* (1) and in *In re Godley's Estate* (2) were different.

Ross, J.:—

Jan. 29.

This is an application to vary an order fixing priorities. The point in dispute is whether a charge of £900 Irish has merged in the inheritance or is still subsisting. This charge was created by a deed of 17th July, 1807, in favour of Alice Lloyd. On 25th July, 1845, Rev. Rickard Lloyd, the owner of the lands upon which it was charged, put these lands into settlement subject to the existing mortgages and charges, including this charge of £900 Irish.

After providing a life estate for the husband and a jointure for his wife, the settlement creates a term of 500 years for the purpose of raising £5000 for the benefit of the children of the marriage in such shares and manner as the said Rev. Rickard Lloyd should appoint. The ultimate remainder is vested in the Rev. Rickard Lloyd.

In the year 1847 the Rev. Rickard Lloyd paid off the charge of £900 Irish, and got an assignment of it to a trustee for himself. In the year 1848 the Rev. Rickard Lloyd mortgaged the lands, but subject *inter alia* to this charge, and in the year 1849 he further mortgaged the lands, subject as before to the charges. By his will, made on 5th May, 1854, Rev. Rickard Lloyd devised all his lands to his brother William Thomas Lloyd, and his wife Eliza, upon certain trusts, which I need not state at any length. In certain events he directed the lands of Meldrum to be sold, and the proceeds applied in the payment of the debts and incumbrances affecting his other estates, including the lands for sale in this matter. He directs a sufficient portion of his personal estate, not specifically bequeathed to his wife, to be sold and applied *inter alia* in keeping down interest on judgments, charges, and incumbrances

(1) 29 Beav. 199. (2) [1896] 1 I. R. 45.

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affecting his said estates. He directs that all the residue of his personal estate and his freehold and leasehold estates are to be managed by his wife and brother till his son should attain twenty-three. They are to apply the entire of the rents in paying outgoings, interest on the charges, and other matters. The remainder of the rents they are directed to invest, with power to apply them in the payment of debts, charges, and incumbrances affecting his said real estates; and subject as aforesaid, he devised and bequeathed all his real, freehold, and leasehold estates to his eldest son Rickard Lloyd, upon attaining the age of twenty-three, with devises over to his other sons in order of seniority, and with divers remainders over. As to such part of his personal estate as might exist when his eldest son should attain the age of twenty-three, he directed it to be transferred to the said eldest son. He further empowered his trustees, if it should appear to them more desirable, to sell the entire or any part of the personal estate, and apply the proceeds in payment of any debts, charges, and incumbrances affecting the said estates.

By a codicil made in the year 1856 he charged the lands with a sum of £1000 to be divided with the £5000 among his younger children. The testator died in the year 1856. Neither in his will nor in any deed did the testator specifically mention the charge of £900. But his eldest son and devisee treated it as a subsisting charge, and specifically made it, with other property, the subject of mortgage on several subsequent occasions.

If my decision were to depend upon the intention of the owner at the time he bought in the charge, I should not hesitate to find that the charge had never merged. It was for his advantage to have it kept alive, there being other charges puisne to it. He was a limited owner, and the assignment was made to a trustee. This, however, carries me a very short way indeed. The fact that the assignment was made to a trustee is a strong argument against merger (1), but is by no means decisive. It is further well settled that the time at which the presumption must be considered to arise is not the time when the owner of the estate becomes entitled to the charge. In the words of Lord Romilly—"I am of

(1) *Hood* v. *Phillips*, 3 Beav. 513.

opinion that the presumption arises on the death of the person who is entitled to both the estate and the charge, and that this intention is to be collected from all the circumstances which existed at that period. All the acts of the person so entitled prior to his decease must be taken into account for the purpose of ascertaining his expressed intention, if any such exist, and all the facts affecting his position down to and at the time of his decease must also be taken into consideration for the purpose of ascertaining from them the intention of the testator." In the year 1848 he mortgages the lands, but not this charge to which he is entitled. He mortgages subject to the existing charges and incumbrances, but it is not mentioned that the charge created in 1807 is now vested in the mortgagor. He makes a similar deed in 1849. In the view that I take it is not necessary for me to decide whether the mortgagor could effectually set up the charge so assigned to him against his mortgagees under such circumstances. It is to be observed that from the day he acquired the charge till his death he never in any way alludes to the continued existence of this charge.

What seems to me conclusive in the matter is his will. After reading the will it seems to me impossible to believe that the man who executed that will had the faintest idea that the charge was subsisting, as distinct from his estate.

The lands of Meldrum are to be sold in certain events, and the proceeds are to be applied in payment of the debts and incumbrances affecting these estates. This £900 is the first incumbrance. In what intelligible way are the trustees to carry out his directions if the charge subsists? Again, he gives his trustees power to apply the accumulated fund in payment of charges and incumbrances. The will indicates a strong desire on the testator's part to clear the lands of incumbrances in so far as possible. Finally, he devised all his real estate to his son Rickard Lloyd when he attained twenty-three, and the residue of his personal estate to him also when he attained that age. The codicil, in which he creates a further charge of £1000 in addition to the £5000 already appointed to the younger children, indicates that he believed the real estate to be solvent. From all this it is plain that he regarded the charge as extinguished. I am, therefore, of opinion that the

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charge merged in the inheritance, and refuse the motion accordingly.

Solicitors for the trustees of the settlement: *Baker & Ringwood.*

Solicitors for the incumbrancer having carriage: *Moore, Keily & Lloyd.*

W. C. S.

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Jan. 20.

MILLAR *v.* SINCLAIR.

(1902. No. 9011.)

Executor and administrator—Fee-farm grant—Executors of original grantee—Assignment to purchasers—Covenant for rent—Liability for future breaches—22 & 23 Vict. c. 35, ss. 27, 28.

Where the executors of an original grantee of a fee-farm grant assigned same to a purchaser, and subsequently, on the demand of the head landlord, set apart and retained out of the assets of the testator a sum sufficient to meet any future liability in respect of the covenant for rent in the fee-farm grant:

Held, that, under sections 27 and 28 of the 22 & 23 Vict. c. 35 (Lord St. Leonards' Act), the executors could not retain, and the head landlord could not require them to retain, any such sum as aforesaid, and that the same should be distributed among the persons entitled thereto.

ADJOURNED SUMMONS.

By his will, dated 6th January, 1882, Hugh White, of Belfast, devised all his estate to his executors in trust, among other things, for his five children, the present plaintiffs, in equal shares. He nominated the Right Hon. Thomas Sinclair, James Purdon, and his wife Mary Jane White (since deceased) executors of his will, and gave them a power of sale over his real and leasehold property.

Hugh White died on the 11th April, 1882. His executors duly administered his estate, with the exception of a sum of £5092 1*s.* 8*d.*, invested in bonds of the Belfast Harbour Commissioners, under the circumstances hereinafter mentioned.

It appeared that the said Hugh White held certain business

premises in Wine Cellar Entry, Belfast, under a fee-farm grant, dated 10th May, 1877, made by William Hardy to the said Hugh White, subject to the yearly rent of £200, and the said fee-farm grant contained a covenant by the said Hugh White, binding himself, his executors, administrators, and assigns during the continuance of the grant to pay the said rent of £200 to the said William Hardy, his executors, administrators, or assigns.

In the year 1883 the executors, in pursuance of the direction contained in the will, sold the premises in Wine Cellar-street, together with the business of spirit merchants carried on therein, to James Anderson and William Kell, and by a conveyance, dated 2nd July, 1883, the premises were duly conveyed to them.

The representatives of the said William Hardy, pursuant to a statutory notice to creditors, issued by the executors in the year 1888, five years after the death of the said Hugh White, served notice upon them, calling upon them to retain in their hands a portion of the estate of the deceased, sufficient to meet any liability that might arise in respect of the said covenant on the part of the deceased to pay the rent reserved by the aforesaid fee-farm grant, and in accordance with that notice the executors retained the aforesaid sum of £5092 1*s.* 8*d.* in their hands to meet any such future liability.

The present summons was taken out by the plaintiffs, who were the children and devisees of the testator, to have the question determined whether the executors were entitled to retain the aforesaid sum of £5092 1*s.* 8*d.* for the purposes above mentioned.

Mr. H. F. A. Hardy, the representative of the original grantor, obtained the leave of the Court to appear and argue the question.

S. L. Brown, K.C., and *Donaldson*, for the plaintiffs:—

The liability of the executors is either a liability under section 27 of Lord St. Leonards' Act to "the rents, covenants, or agreements contained" in a lease granted to their testator, or a liability under section 28 to the "rents, covenants, or agreements in any conveyance on chief rent or rentcharge (whether any

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such rent be, by limitation of use, grant, or reservation)." No matter which of these sections the liability of the executors for the rent reserved by the fee-farm grant falls under, they are protected from any personal liability therefor, or the breach of any covenant therein, once they have, as here, conveyed the premises comprised in the fee-farm grant to a purchaser. The provisions of sections 27 and 28 are exactly alike and are very express. A fee-farm grant must be either a lease within the meaning of section 27 or a conveyance on rentcharge (the rent being reserved) within the meaning of section 28. In either case the executors are fully protected. In *Buckley* v. *Nesbitt* (1) it was held that an executor, following the steps prescribed in these sections, has the same absolute protection as he would have had if the assets had been distributed under a decree of the Court, and the Court refused to make any provision for the indemnity of the personal representative against future accruing rents under leases in which the testator had been the original lessee. The landlord has no independent equity to require such a fund to be set apart: *King* v. *Malcott* (2). An indemnity fund set apart in respect of leaseholds was paid out without the consent of the ground landlord: *Sowdon* v. *Marriott* (3), where *Bunting* v. *Marriott* (4) was not followed.

Serjeant Dodd, for the executors.

Harrison, K.C., and *John Thompson*, for the head landlord:—

The summons does not ask for administration. The Act does not protect the executor, inasmuch as the assignment was not to a *bona fide* purchaser, but was merely for a nominal sum. *King* v. *Malcott* (2) is only an authority for the proposition that the landlord himself can take no step to have an indemnity fund set apart, but in the present case the fund has been actually set apart and retained by the executors. That being so, *Bunting* v. *Marriott* (4) is an authority for the proposition that the fund cannot be parted with without the consent of the head landlord. Section 27 obviously deals with leaseholds, and therefore the present case

(1) 5 L. R. Ir. 199.
(2) 9 Hare, 692.
(3) 21 W. R. 808.
(4) 9 W. R. 264.

must be dealt with, if at all, under section 28. It would seem that the latter section only embraces property which vested in the executors as such. It is clear that it could not apply to freeholds (see note in Shelford's Real Property Statutes, 10th ed., p. 534), and it is extremely doubtful whether its operation extends to the case of a fee-farm grant.

Donaldson, in reply :—

Even where there is otherwise no consideration, the assignment of leaseholds subject to onerous covenants may amount to an assignment for value : *Lee* v. *Mathews* (1) ; *Gardiner* v. *Gardiner* (2). The assignment in the present case was for value, having regard to the onerous nature of the covenants.

THE VICE-CHANCELLOR held that a fee-farm grant came within the provisions of the Act ; that the assignment was for value ; and that consequently the executors had no right to retain, and the landlord had no right to require them to retain the fund, and he directed the executors to distribute the same among the beneficiaries entitled thereto.

Solicitor for the plaintiffs : *Martin.*
Solicitors for the defendants : *Henry & Son.*
Solicitor for the landlord : *G. L. M'Lean.*

J. MAC M.

(1) 6 L. R. Ir. 530. (2) 12 I. C. L. R. 565.

V.-C. 1903. March 3.

In re O'CONNELL'S ESTATE, and In re THE SETTLED LAND ACT, 1882.

(1903. No. 139.)

Settled Land Acts—Tenant for life—Building lease—Extended term—Settled Land Act, 1882, *sect.* 10, *sub-sect.* 2 (44 & 45 *Vict. c.* 41).

Leave given to the tenant for life of a settlement to grant a building lease of settled land for 500 years, under the Settled Land Act, 1882, section 10, sub-section 2.

By an indenture of marriage settlement, executed on the marriage of John O'Connell and Arabella Hayes, certain lands and, among others, the lands of Ballincurrig, situate in the barony of Barrymore and county of Cork, were conveyed to Thomas Philpot Hayes and Ernest Minniken to the use of John O'Connell during his life and subject to a certain rentcharge in favour of the said Arabella Hayes, with remainder to the first and other sons of the said John O'Connell and Arabella Hayes in tail male, with remainders over. The settlement also provided that Thomas Philpot Hayes and Ernest Minniken were to be trustees for all the purposes of the Settled Land Acts.

The portion of the lands which was the subject of the present application comprised 21a. 1r. 16p., and was held under a lease dated 13th October, 1875, for a term of thirty-one years by Timothy Desmond and William Bateman, at the yearly rent of £73 3*s.* 10*d.* The tenants had taken steps to have a fair rent fixed, and had sold their interest in the lease to Thomas Donovan for £500.

A proposal in writing, dated 31st January, 1903, was signed by the said Thomas Donovan offering to take a lease of the lands for 500 years at the yearly rent of £65, and undertaking to lay out a sum of £1000 at least in the erection of substantial dwelling-houses on the lands within three years. He refused to take a lease for 99 years.

The present summons was taken out by John O'Connell, Thomas Philpot Hayes, and Ernest Minniken, to obtain the leave of the Court under the Settled Land Act, 1882, sect. 10, sub-sect. 2, to grant a lease of the lands upon the above-mentioned terms.

The evidence offered in support of the application consisted of affidavits from land agents, who stated that neighbouring landlords were in the habit of granting leases for periods ranging from 200 to 999 years, and that it would be extremely difficult to procure the acceptance of a lease for merely 99 years.

Sugrue, in support of the application:—

The affidavits show that tenants in this district will not accept a building lease for 99 years, but require a much longer term. The lands are undoubtedly within the scope of the Land Acts. The tenant refuses to accept a shorter term than 500 years, and if he fails to get a building lease for that period, he will go into Court and have a fair rent fixed, which would be very prejudicial to the interests of the beneficiaries entitled under the settlement. Although no local custom has been proved to exist in reference to the duration of building leases in the neighbourhood, the Court has power under the Settled Land Act, 1882, sect. 10, sub-sect. 2, to sanction an extended term where it is for the benefit of the parties interested.

THE VICE-CHANCELLOR made an order sanctioning the granting of a lease upon the terms proposed.

Solicitors for the applicants: *O'Kearny & Barrington.*

J. MAC M.

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1903.
Jan. 26, 31.

Re LYONS.
LYONS *v.* LYONS.
(1902. No. 1133.)

Advancement—Heir-at-law—Assignment—Settlement—Marriage—Consideration—Distribution of assets—Hotchpot—Statute of Distributions (7 *Wm.* 3, *c.* 6), *s.* 2.

D. was possessed of a farm of land held under lease *pur autre vie*. By deed, executed on the marriage of his son J., in consideration of the marriage and of £600 paid to him by the father of the intended wife, D. assigned the farm and certain stock and chattels to J. D. died intestate, leaving J., his eldest son and heir-at-law, surviving:—

Held, that the farm was exempt from being brought into hotchpot in the distribution of assets, on the ground that the assignment of it was an advancement of "land" to the heir-at-law, but that the stock and chattels transferred to him by the deed must be brought into hotchpot, as being simply an advancement of personal estate.

ORIGINATING SUMMONS.

Prior to the marriage of John Joseph Lyons with Mary O'Gorman, by indenture dated 25th February, 1885, Daniel Lyons (the father of John Joseph Lyons), in consideration of the intended marriage and of the sum of £600 paid to him by Thomas O'Gorman (the wife's father), assigned to John Joseph Lyons part of the lands of Cregane, in the county of Limerick, held under lease dated 21st June, 1869, for sixteen years, or for the life of John Joseph Lyons. The rent reserved by the lease was originally £200, which was reduced by arrangement in 1881 to £140. The deed also assigned twenty-nine cows, one horse and car, and certain chattels, for the same consideration, to John Joseph Lyons absolutely.

In 1885 John Joseph Lyons was one of the younger children of his father, but at the time of his father's death was his eldest son and heir-at-law. A fair rent of £103 was fixed in respect of the lands of Cregane, by order of the Land Commission, on 20th

November, 1896. There was evidence that the value of the farm was now £1500 at least.

Daniel Lyons died intestate on 21st April, 1902. The defendant Margaret Lyons was the daughter and administratrix of the intestate.

The question for determination by the Court was whether John Joseph Lyons was bound, before obtaining a share of the assets of his father Daniel Lyons, to bring into hotchpot the property assigned to him by the deed of 25th February, 1885.

Sugrue, for the plaintiff John Joseph Lyons :—

The doctrine of advancement does not apply in the case of the heir-at-law, at least as regards freehold land. That is the effect of section 2 of the Irish Statute of Distributions (7 Wm. 3, c. 6). The wife's fortune of £600 was paid to Daniel Lyons, and the assignment of the farm and stock was not an advancement, but was made by way of purchase. Even if the doctrine of advancement is applicable to a case where a marriage settlement is made on the occasion of marriage, it has no application here, because in this case the deed of 1885 was a purchase deed, and not a settlement made in consideration of marriage. See the observations of Chatterton, V.-C., in reference to an agreement of this kind, in *Hoare* v. *Hoare* (1).

Matthew J. Bourke, K. C. (with him *P. Kelly*), for the defendant Margaret Lyons :—

The facts here are peculiar. The plaintiff, who now claims exemption as heir-at-law, was but a younger son in 1885, when his father provided for him on his marriage. He now claims a distributive share, without bringing into hotchpot the provision made for him by the father. This claim he bases on the fact that his eldest brother, having died in the father's lifetime, he (John) was, on the father's death, his heir-at-law, and, therefore, as such exempt by the statute from bringing into hotchpot the farm and stock given to him on his marriage. If his contention prevails it will defeat the intentions of the father, who believed he had fully provided for

(1) 11 L. R. Ir. 310.

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him. His contention, however, is untenable. The immunity given by the statute to the heir-at-law is not a personal one in respect of every species of property given to or acquired by him, but simply exempts him from bringing into hotchpot real estate which came to him by descent or otherwise: *Pratt* v. *Pratt* (1). The object was to preserve the principle of primogeniture. Because if the heir-at-law could not participate in the personal assets without bringing the real estate into hotchpot the next-of-kin would thereby be getting portion of the inheritable freeholds which the common law considered the privilege of the heir. This reason for the exemption is also the measure and limit of its application. Accordingly, the heir is not exempt from bringing into hotchpot advancements which are not realty. The farm here was held in 1885 under a lease for a life or sixteen years, and though the *habendum* was to the heir, the estate was not in law inheritable freehold (that is fee-simple or fee-tail), but would have gone to the heir as special occupant; that is by the terms of the lease, and not by descent at common law: Comyn's Digest, Admon. H.; Burn's Ecc. Law, vol. 4, 9th ed., pp. 532, 533; *Lutwyche* v. *Lutwyche* (2); *Kircudbright* v. *Kircudbright* (3); *Dillon* v. *Coppin* (4). This construction carries out the acknowledged intention of the statute to make the provisions for all the children equal without trenching upon the common law principle of primogeniture.

Plaintiff's contention that the provision made for him on his marriage was not an advancement is unsustainable. His point is that the wife's fortune of £600 was paid to his father, and that, therefore, the settlement of farm and stock on him was by way of purchase and not an advancement. That point was disposed of in *Edwards* v. *Freeman* (5), and in *Phiney* v. *Phiney* (6), where it was laid down and established that provisions made for children by marriage settlements and for valuable consideration, although in the nature of purchases, are nevertheless advancements within the meaning of the statute. Such advancements are not restricted to

(1) Fitzg. Rep. 285.
(2) Cas. Temp. Talbot, 276.
(3) 8 Ves. 55.
(4) 4 M. & Cr. 647.
(5) 2 P. Wms. 440, 441.
(6) 2 Vern. 638.

voluntary gifts or settlements. See also Burn's Ecc. Law, vol. 4, p. 534.

THE MASTER OF THE ROLLS (after stating the facts) said :—

The assignment of 1885 was no doubt of such a nature as is extremely customary in the South of Ireland. In substance it was what is there deemed a marriage settlement. There are no limitations in favour of the husband and wife for life and the children of the intended marriage, but it was, as understood by the parties, a marriage settlement. Instead of the wife's father putting a sum of money as her fortune into settlement, he usually pays money to the father of the intended husband. The husband's father sets up the young couple in life by giving them a farm. The conveyance in question was one for the highest consideration possible, it was made in consideration of marriage, and for money paid to the extent of £600. There was a provision in the deed that if the husband died without issue in her life-time the wife was to get £750, but as things turned out that is not material. The deed was apparently only executed by Daniel Lyons. He died last year intestate, and his daughter Margaret Lyons took out administration to him. Her case is that the plaintiff, although a son of the deceased, is not entitled to a distributive share of his father's assets without bringing into hotchpot the farm and stock assigned to him on his marriage, as being an advancement; and inasmuch as the benefit he received under the deed of 1885 largely exceeds in value any share that he would take as one of the next-of-kin, the result would be to practically exclude him from any share in the assets. It does seem clear that the farm is of greater value than what his share would amount to. The wife's fortune of £600 was not an equivalent for it. There is some evidence that it is now worth £1500. The original rent reserved by the lease was reduced by arrangement. It has been further reduced, and what was a leasehold in 1885 is now a practically perpetual tenancy entitled to the benefit of the Land Acts. As to the contention that the assignment of this farm by the father to the plaintiff was an advancement to him and must be brought into hotchpot, the question turns on the construction and effect of section 2 of the Irish Statute of

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Distributions (7 Wm. 3, c. 6), which is the same as section 5 of the English Act (22 & 23 Car. 2, c. 10). It provides as follows:— "That all ordinaries, and every other person, who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following; that is to say, one third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions, equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made; and in case any child (other than the heir-at-law), who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion, not equal to the share which shall be due to the other children by such distribution as aforesaid, then so much of the surplusage of the estate of such intestate to be distributed to such child or children, as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated; but the heir-at-law, notwithstanding any land which he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of lands which he hath by descent or otherwise from the intestate."

If the latter part of the section which refers to the heir-at-law directly, and not merely by exclusion, applies to all land he takes "by descent or otherwise," there could be no question but the words "or otherwise" would embrace the present case, and there could be no question if land within the section comes to him "by descent or otherwise," that it ought not to be taken into account in the distribution of assets. Another argument was suggested, and was apparently in the mind of the person who framed the affidavit. It was that John Joseph Lyons was not the eldest son of his

father at the time of the execution of the deed of 1885, and therefore at the time of the advancement was not the heir-at-law, and therefore did not come within the words of the section. The fallacy of this argument is apparent. No one can be the heir of a living man—*Nemo est haeres viventis*. He was at the time of his father's death the heir-at-law. The real question, however, is—Was the farm land within the meaning of the statute? And in considering that question it must be first seen what it was that was given to him by the deed of 1885. It was a leasehold interest, a lease held *pur autre vie* in the hands of the intestate, and after the assignment to the plaintiff practically an estate for his own life. It was an estate of freehold. Mr. Bourke was driven to say that an estate of that kind was not within the meaning of the section; but for that proposition no authority was cited. The question is whether this farm is land derived from the intestate otherwise than by descent. The cases on the subject are not numerous, and, oddly enough, they mostly have reference to younger children, and not to the eldest son.

It has been held in cases cited that "land" in the section applies to copyholds, and is not to be limited therefore to such land as is held for an estate in fee or in tail. It includes lands of freehold or copyhold tenure which have been put in settlement, and extends also to charges upon land, as in *Edwards* v. *Freeman* (1), reported in Peere Williams, where there is a very learned disquisition on the matter. It is impossible to hold that the word "land" has a different meaning in the different parts of the section, unless there is something leading coercively to that conclusion.

In *Smith* v. *Smith* (2) the question arose upon exceptions to the Master's report as to whether a sum of money paid by an intestate for repair of houses was paid as an advancement to the defendant his eldest son, and was therefore to be brought into hotchpot under the statute, the younger son of the intestate alleging that the houses upon which the money was expended were given by the intestate in his lifetime to the defendant, and did not descend to him as heir. The Master's report stated that the sum for repairs was paid as an advancement, and an exception

(1) 2 P. Wms. 440, 441. (2) 5 Ves. 721.

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was taken on the ground that the money was paid by the intestate in consequence of a promise to repair, and that the houses on his death, which happened after the repairs were done and the money paid, descended to the defendant as his eldest son and heir. The Master of the Rolls (after saying that he was afraid he was not at liberty to decide in favour of the infant child of the younger son unless the intestate had irrevocably parted with the premises) says :—" I agree, if he had vested that estate in his son, and had afterwards given him a sum of money to ameliorate it, that would have been an advancement; but as he did not part with the estate, I do not apprehend, under the words of the statute this money laid out upon it could be an advancement. Suppose he had made a will; and given the houses away from his son; or sold them. At his death he might, if he thought fit, have given them to anyone else; and therefore laying out this money upon them during his life was no advancement to the son. Then at his death they descended to the eldest son with the amelioration as heir-at-law. Under the circumstances, therefore, this cannot be considered an advancement to the eldest son."

That case and similar ones were much relied on; but there is one not cited during the argument which has a closer bearing than any of the others on the present question. In *Chantrell* v. *Chantrell* (1) a father by deed conveyed real estate to trustees for a term of years upon trust during his lifetime to pay to his eldest son an annuity of £100. Some years afterwards the father died intestate, and it was held that the advancement to the eldest son being an annuity charged on land was within the exception in favour of the heir-at-law, and need not be brought into hotchpot. It is unnecessary to state fully the facts of the case. In giving judgment, Malins, V.-C., says:—" The law stands thus: According to the Statute of Distributions, every child is bound to bring into hotchpot all advances made to him by an intestate in his lifetime, that there may be an equal distribution of the estate. The heir-at-law is excepted from that; but it is plain, from the latter part of the 5th section of the Act, that he is only excepted as to land derived from the intestate. Therefore, whenever an advance is

(1) 37 L. T. (N. S.) 220.

made to the heir-at-law out of the personal estate he must bring that advance into account; but if he gets land only, he is not bound to bring it into account. And if he has only a charge on land, it seems to me that the same rule must apply. Here is an annuity chargeable only on land, and paid only out of land; and, therefore, in my opinion, he is not liable to bring it into hotchpot."

In that case the charge of the annuity upon lands in favour of the eldest son was held to be "land" within the meaning of the section. No doubt the estate on which the annuity was charged might have descended to the heir-at-law, and the annuity received by him was in the nature of a chattel interest to be enjoyed by him for a term of years. But however that may be, there is no principle or authority for restricting the interpretation of "land" in the section to an estate of descendible freehold; and in the present case we have a freehold lease which would not have vested in the personal representative. The result is that so far as the farm is concerned the plaintiff is not bound to bring it into hotchpot.

As to the £600 paid by O'Gorman, the wife's father, as an inducement to enter into the contract of advancement, I cannot say (as was contended) that it was the purchase-money of the cows and stock any more than of the farm. I hold that the farm is exempt from being brought into hotchpot on the ground that the assignment of it was an advancement of "land" to the heir-at-law.

But as regards the cows and horses, and so forth, which were also transferred on the occasion of the marriage, this was a simple advancement of personal estate and nothing more, and, of course, must be brought into hotchpot. There will be an inquiry as to the value of the stock, &c., so advanced.

Solicitors for the plaintiff: *O'Kearny & Barrington.*
Solicitor for the defendant: *Patrick Liston.*

R. W. L.

Appeal.
1902.
July 14.

In the MATTER of the DEFENCE WORKS at BEAR ISLAND and MRS. CATHERINE DOYLE, and Others (1).

Costs—Compulsory taking of land—Defence Acts—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 80, 82—*Payment of duty.*

The War Department, for the purpose of erecting defence works on Bear Island, in Bantry Bay, took by compulsory proceedings the tenants' interests in part of the island. The tenants had no title except occupation, and the War Department in some instances required representation to be taken out to former occupiers:—

Held (affirming the decision of Porter, M. R.), that the War Department were liable to pay the death duties, as well as the costs of raising personal representatives.

The War Department, having determined to erect certain defence works on Bear Island, in Bantry Bay, acquired by compulsory proceedings the tenants' interests in part of Bear Island for the above purpose. The compensation was fixed by arbitration, and conveyances were being taken after investigation of title. In several cases title could not be made without representation being raised to former occupiers; the tenants had nothing but possessory titles, and no documents. The War Department were willing to pay the cost of taking out probate, or letters of administration, in the cases where this was necessary, as part of the costs of deducing title under sect. 82 of the Lands Clauses Act, 1845, but they declined to pay the death duties.

When the costs came before the Taxing Officer the liability of the War Department to pay death duties was disputed on the ground that the liability to pay these duties did not arise or come into existence by reason of the purchase or necessity of making title. It always existed and rested on the successor on the passing of the estate to him on the death of his predecessor.

(1) Before Lord Ashbourne, C., and FitzGibbon, Walker, and Holmes, L. JJ.

On the 16th April, 1902, the Taxing Master made his report, overruling the objections. The Secretary of State for War appealed to the Master of the Rolls against this ruling of the Taxing Master, but on the 3rd June, 1902, the Master of the Rolls affirmed the decision of the Taxing Master, and the Secretary of State for the War Department appealed to the Court of Appeal.

J. F. Vesey FitzGerald, for the appellant :—

The probate duty does not fall under the same rules as the costs of taking out administration. It is a charge on the land and must be paid by the vendor : the case depends on the ordinary law of vendor and purchaser. The benefit is not exclusively for the lands taken, but for the property. If there is a good holding title, and if through excessive caution the purchaser asks for more, he must pay the costs : *Re Dublin Junction Railways, Ex parte Kelly* (1) ; *Midland Great Western Railway, Ex parte Rorke* (2) ; *Re Liverpool Improvement Act* (3). But in the present case there was no good holding title.

Healy, K.C., and *Sullivan, contra* :—

There is no distinction between probate duty and costs of administration : *Re Lloyd and The North London Railway Act*, 1861 (4). The Lands Clauses Act are incorporated with the Defence Acts.

The judgment of the Court of Appeal was delivered by—

HOLMES, L. J. :—

This is an appeal from an order of the Master of the Rolls refusing to review the taxation of a bill of costs in respect of certain items therein allowed by the Taxing Officer under the following circumstances.

The Secretary of State for War acquired by virtue of the compulsory powers vested in him by the Defence Acts and other statutes certain lands in Bear Island for the construction of

(1) 31 L. R. Ir. 137.
(2) [1894] 1 I. R. 146.
(3) L. R. 5 Eq. 282.
(4) [1896] 2 Ch. 397.

Appeal. 1902.

In re Bear Island Defence Works and Doyle.

Holmes, L.J.

defence works. As might be expected in that part of the country, the tenants had no paper or other title to show beyond occupation and the payment of rent for a period long or short. When a tenant died no representative was raised to him, but his widow, children, or other relatives went into possession without challenge or objection. In those circumstances, the solicitor for the War Office required in cases where the apparent change of tenancy was recent the present occupant to obtain letters of administration to his predecessor; and the solicitor for the tenants has included in the bill of costs claimed from the War Office the costs thus incurred.

This claim is based on the Lands Clauses Consolidation Act, 1845, section 82, which provides that the costs of conveyances of lands compulsorily taken shall be paid by the promoters, including all charges and expenses by either seller or purchaser of all assurances of the lands and of any outstanding terms or interests therein, and of deducing, verifying, and evidencing the title and all other reasonable expenses incident thereto.

Mr. FitzGerald at first seemed disposed to argue on behalf of the War Office that this section of the Act of 1845 does not apply to the exercise of compulsory powers to take lands under the Defence Acts; but on his attention being called to the fact that his clients were not challenging many items to which the sellers could only be entitled by virtue of this or some equivalent enactment, he did not press this argument; and indeed he ultimately confined his objection to the allowance by the Taxing Officer of the duty paid to the Crown on taking out administration. Costs of this nature are claimed not only under section 82, but also under section 80—under the former when title is made out of Court, under the latter when the purchasers, dissatisfied with the title, pay the purchase-money into Court, and representation is raised as a necessary condition to getting it out. Under whichever of these sections the claim is made the question is the same; and Porter, M.R., when asked to review the taxation in this case, considered the point settled by authority.

So long ago as the year 1868 Lord Romilly in *In re the Liverpool Improvement Act* (1), overruling a previous decision of his

(1) L. R. 5 Eq. 282.

own which he said he believed stood alone, *In re South Wales Railway Company* (1), allowed the costs of letters of administration *de bonis non* taken out for the purpose of making title on a compulsory purchase. This decision has been followed in this country again and again. I may mention, as examples of its application, three cases: *In the Matter of the Dublin South City Market Company, Ex parte Keatley* (2), *City of Dublin Junction Railways, Ex parte Kelly* (3), and *In re Midland Great Western (Ireland) Railway Company, Ex parte Rorke* (4).

The principle is that the involuntary vendor was satisfied with his title; it was good enough for him, and administration would not have been obtained except to comply with the requirements of the purchaser exercising compulsory powers. I consider this principle sound; and in any case, it is now too late for even an appellate Court to alter it. In a comparatively recent case, *In re Lloyd and the North London Railway (City Branch) Act*, 1861 (5), Stirling, J., acted on it, saying that "I am not sure that, in the absence of these authorities, I should have come to the same conclusion; but it is very desirable that the practice should be the same in both countries; and I therefore follow the Irish Courts." I may say, however, notwithstanding Mr. Justice Stirling's doubt, that I have been unable to find any trace of difference in the practice of the two countries. Mr. FitzGerald has attempted to distinguish between the duty paid to the Crown and the other costs of administration, on the ground that the former is a charge on the property. Such a distinction has I believe never been suggested before, and it is wholly illogical. The duty would certainly never have been enforced or paid if it had not been for the compulsory sale, and it cannot be separated from the other expenses of administration. Therefore the appeal is dismissed with costs.

Solicitor for the War Department: *Sir P. Coll.*
Solicitor for the tenants: *Maurice Healy.*

R. D. M.

(1) 14 Beav. 418.
(2) 25 L. R. Ir. 265.
(3) 31 L. R. Ir. 137.
(4) [1894] 1 I. R. 146.
(5) [1896] L. R. 2 Ch. 397.

V.-C.
1902.

Oct. 31.
Nov. 12.

RUSSELL *v.* RUSSELL.

(1902. No. 781.)

Will—Construction—Contingent gifts—Maintenance—Discretionary power—Vesting.

A testator bequeathed certain property to his nephew upon his attaining twenty-five, and directed his trustees to accumulate the profits and invest them in trust for his said nephew on his attaining twenty-five. He also empowered his trustees, in their absolute discretion, to apply any part of said profits or the income thereof, for the advancement, maintenance, and education of his said nephew while under such age. The nephew died before attaining twenty-five :—

Held, that the gifts of both capital and income were contingent, and therefore failed.

Adjourned Summons.

By his will, dated 2nd December, 1895, Patrick Russell, of Athnid, in the county of Tipperary, after appointing his wife Mary Russell, and his nephew Rev. Nicholas Russell, Dr. Martin Callanan, and Patrick Finn, his executors and trustees devised and bequeathed to his trustees, subject to certain life interests given to his wife, his farm at Athnid and the stock and chattels thereon, in trust for his nephew Patrick Russell, of Ballyduag, upon his attaining twenty-five years, and also the fourth share or interest which he had in the outside farm of Kiltilliha, together with the stock and chattels belonging to him thereon at his death, also in trust for his said nephew Patrick Russell, of Ballyduag, upon his attaining twenty-five years. The will then contained the following direction : "And until my said nephew shall attain such age I direct my trustees to work, manage, and farm said lands according to their best skill and judgment, and after payment of rent, expenses, and outgoings, to put up and accumulate the profits in any form of investment or security they deem expedient in their discretion, in trust for my said nephew upon his attaining twenty-five years, provided always that while he shall be under such age it shall be lawful for the trustees in their absolute and uncontrolled

discretion to spend and apply any part of said profits or the income thereof in the advancement, maintenance, and education of my said nephew." The testator also directed that upon the death of his wife in the lifetime of his said nephew the dwelling-house, furniture, and household effects, and the premises reserved for her use and enjoyment during her life as aforesaid should be subject to the trusts above expressed in favour of his said nephew. He appointed his wife Mary Russell his residuary legatee and devisee. The testator died in 1898, and probate of his will was granted to Patrick Finn, of Main-street, Thurles, and Mary Russell, of Athnid, aforesaid, two of the executors named in said will. Patrick Russell, the nephew of the testator, died in 1902, before attaining twenty-five years of age, after having first made his will, dated 21st June, 1902, whereby he devised and bequeathed to his brother James Russell absolutely all his real and personal estate and effects whatsoever. Probate of said will was granted to the said James Russell, the executor named therein, on the 29th July, 1902.

The present summons was taken out by Patrick Finn and Mary Russell, the above-named executors of the will of Patrick Russell, senior, to have it determined whether Patrick Russell, junior, took on attaining twenty-one a vested interest in the property bequeathed to him under the will of his uncle Patrick Russell, transmissible to his representatives on his death, or whether it passed to Mary Russell, as residuary legatee and devisee of Patrick Russell, senior.

Carrigan, for the executors.

O'Connor, K.C., and *Devitt*, for James Russell:—

A gift *simpliciter* to a person on attaining twenty-five is of course contingent, but such a gift is made vested when coupled with a gift of the income during the period of suspense. There is a distinction between a gift of the whole income as here from a gift of only a portion; but when the whole income is given, a discretion conferred on trustees to apply less than the whole will not displace the rule: *Fox* v. *Fox* (1); *Harrison* v. *Grimwood* (2).

(1) L. R. 19 Eq. 286. (2) 12 Beav. 192.

V.-C. 1902.

RUSSELL v. RUSSELL.

In the present case the gift of income is annexed to the *corpus*, and the case therefore falls within *Brennan* v. *Brennan* (1).

Matheson, *K.C.*, and *Gerald FitzGibbon*, for the widow Mary Russell as residuary legatee of the testator :—

The gift of the *corpus* being contingent, the gift of the income must be contingent too. By the will the accumulations were not to vest till the devisee attained twenty-five. There is no dedication of the entire income, inasmuch as whatever the trustees did not expend on maintenance was to be accumulated and invested, and they could then only apply the income of such accumulated income. The case is in this respect distinguishable from *Fox* v. *Fox* (2). In that case, however, the principle was extended so as to embrace a case where a gift of the entire income was coupled with a discretion conferred on trustees to apply the whole or only a portion of the income; but that decision is at variance with *Pulsford* v. *Hunter* (3) and *Ashmore's Trusts* (4). It was also dissented from in *In re Wintle*, *Tucker* v. *Wintle* (5), in *Wilson* v. *Knox* (6), and in *Dewar* v. *Brooke* (7). In *Harrison* v. *Grimwood* (8) there was an absolute trust for maintenance during minority, and the question was, whether the period of payment being postponed till the *cestuis que trustent* attained twenty-six, the trust for a partial period did or did not prevent vesting.

Nov. 12.

THE VICE-CHANCELLOR:—

The testator left, subject to certain interests given to his wife for her life, his farm of Athnid in trust for his nephew Patrick Russell upon his attaining twenty-five years, and until his said nephew should attain twenty-five years he directed his trustees to work and manage the farm, and after payment of rent, expenses, and outgoings, to put up and accumulate the profits in any form of investment and security they might deem expedient in trust for his said nephew upon his attaining twenty-five years,

(1) [1894] 1 I. R. 69.
(2) L. R. 19 Eq. 286.
(3) 3 Br. C. C. 416.
(4) L. R. 9 Eq. 99.
(5) [1896] 2 Ch. 711.
(6) 13 L. R. Ir. 349.
(7) 14 Ch. D. 529.
(8) 12 Beav. 192.

provided that while his said nephew should be under such age it should be lawful for the trustees in their absolute discretion to apply any part of said profits or the income thereof in the advancement, maintenance, and education of his said nephew. This gift, standing alone, would clearly have been contingent on his son attaining the prescribed age. But it is contended that it was rendered vested by the trust to put up and accumulate the profits so made upon any investments they might deem expedient, in trust for his said nephew on his attaining the age of twenty-five years, provided always that while he should be under the said age it should be lawful for the trustees in their absolute and uncontrolled discretion to spend and apply any part of the said profits, or the income thereof, in the advancement, maintenance, and education of his said nephew. It may be now considered as settled that a gift otherwise contingent will be deemed to be vested by such a proviso, if there be a dedication of the entire income or profits out and out to the person who is given the contingent interest in the *corpus* of the fund, but that nothing less than this will have such operation. Here it is left entirely in the discretion of the trustees whether they will apply any, and, if any, what part of the income, to the maintenance, &c., of the first taker. There is no obligation on them so to apply it. The *quantum* of any part to be so applied is left entirely in the discretion of the trustees. Any portion of the income, if any, over and above the part to be so applied is to be invested by the trustees for the benefit of the nephew on his attaining the age of twenty-five years. I deem it to be impossible to deal with this as a trust of all these accumulations for the nephew out and out on his attaining twenty-five years. On this ground I must hold that the contingent gift did not thus become absolute, and that it failed by his death before twenty-five years.

There is another ground for arriving at this conclusion which appears to me to be equally conclusive against the contention of the representatives of the nephew. It was also sought to hold this gift to be vested by the manner in which the income up to the nephew reaching the age of twenty-five years was disposed of by the will. It was, in my opinion, clearly a contingent gift of the capital if it stood alone, and the entire reliance for the

V.-C. 1902.

RUSSELL *v.* RUSSELL.

contention that it was converted into an absolute gift was based upon the disposal of the income. But this was not given absolutely, and was expressly subject to the same contingency, namely, attaining twenty-five, that applied to the principal. How then could a gift in its terms contingent be rendered absolutely vested by being coupled with a gift of the savings of the income, which was in its terms expressly contingent on the very same event?

For these reasons, I hold that the gifts of both capital and income failed by reason of the death of the testator's nephew before attaining the prescribed age of twenty-five years.

Solicitor for the executors: *Morgan.*
Solicitor for James Russell: *Ryan.*
Solicitor for Mary Russell: *A. H. Morgan.*

J. MAC M.

Ross, J. 1903.

Jan. 13, 14, 27.

IN THE MATTER OF THE ESTATE OF FRANCIS PETER GERVAIS, OWNER; MAURICE SEELY MAUDE AND ANOTHER, PETITIONERS.

Joint and several bonds—Judgments thereon—Release of one judgment debtor —Relationship of co-debtors.

A and B executed their joint and several bonds in the penal sum of £6000, and judgment was marked on each bond separately. Subsequently, in 1845, the judgment creditors released the lands of A:—

Held, that as the relationship between A and B was that of co-debtors, and not that of principal and surety, the release of A did not release B.

OBJECTION to the final schedule of incumbrances, by Francis Nicholas Evans, on the ground that the judgment set out at No. 23 in the final schedule was stated to be treated as released owing to the effect of the deed of release of the 23rd of July, 1845, whereas that deed having been executed by the judgment creditors of the Rev. Francis Gervais only, the judgment having been obtained on the date set out in the final schedule against the

Rev. Francis Gervais and Francis John Gervais, was not released owing to the effect of the deed of release in respect of the interest of Francis John Gervais in the lands for sale in this matter; and accordingly that the townlands of Tycanny, Bettany, Tullanafoile, Femaghdrum, Tamlaght and Aghnasedagh, part of the lands for sale in this matter, were liable to the judgment set out at No. 23 in the final schedule.

The facts appear fully in the judgment.

S. L. Brown, K.C., for the objector:—

This is a question of law and of fact. The question of fact is, whether Francis John Gervais was a surety? The relationship of principal and surety can be inferred from any legal evidence which is evidence against the persons against whom it is sought to establish it. It cannot be inferred from the fact that one of the parties was the father of the other; there must be something more. Admitting that there are only two documents, the settlement and the will, from which the inference of the fact of suretyship could be drawn, only one of them—the settlement—is evidence against the trustees, and that does not contain a recital or a line which would warrant the Court in holding that one party was principal and the other surety. As against the trustees of Mrs. Evans' settlement, one cannot found any argument on the will at all. The only way in which it could possibly be considered would be as a declaration against interest, which it is not, or on the question of election. The relationship in this case between the Rev. Francis Gervais and Francis John Gervais was that of co-debtors. Admittedly if a security of a principal is released, the debt due by the surety is also released; but it has never been decided that where one joint debtor is not released—*i.e.* where the debt is not released, but only the security for the debt—the debt due by the other joint debtor is also released. If the debt is released both are released, but nothing short of release of the debt deprives the creditor of the right to go against the co-debtor for the debt: see the judgment of Blackburn, J. (read by Cockburn, C.J.), in *Sxire* v. *Redman* (1). The statement of the law

(1) 1 Q. B. D. 536.

Ross, J. 1903. *In re* GERVAIS' ESTATE.

there laid down was not affected by the decision of the House of Lords in *Rouse* v. *The Bradford Banking Company* (1), which turned on another point, namely, that time had not been given to the principal debtors. The release was binding under the old law before 11 & 12 Vict. c. 48, though the loan fell through: *Handcock* v. *Handcock* (2).

Oulton, for the Misses Gervais:—

The objection should be overruled. It is said that Francis John Gervais was not a surety for his father the Rev. Francis Gervais, but a co-debtor; but in either case the result would be the same. There is quite enough on the face of the documents to satisfy the Court that Francis John Gervais was only a surety for the amount secured by the bond and judgments for £3000 which were comprised in the settlement made on the marriage of the daughter. It is not necessary to produce affidavits or documents showing that the son was only a surety: this follows from *Robinson* v. *Gee* (3); it is open to the Court to find it as a fact from the position of the parties. On the marriage of the daughter the father was the principal, it was his duty to provide a settlement. There is no evidence that the son got any benefit. Take the dates: the disentailing deed was in 1845, the settlement in 1843. This latter refers to the settlement of 1812, under which the daughters would be entitled to a share in Tamlaght. In place of this each gets a sum of money, and the son joins in securing that. The effect of this was to give the father himself a benefit —namely, the entire interest in Tamlaght—and not the son, and unless the son got a benefit he should not be put into the position of a principal. No doubt, he would be heir-at-law, but this would procure him nothing more than a problematical benefit. We rely on (1) the position of the parties and (2) the fact that the settlement made on the marriage of Mrs. Evans provides that the father is to get a benefit while the son gets nothing. That is an indication that the father should be treated as a principal. Now coming to the will of the Rev. Francis Gervais, where he states that he bequeaths a legacy to his daughter Catherine Evans, to whom he

(1) [1894] A. C. 586. (2) 1 Ir. Ch. R. 444. (3) 1 Ves. Sen. 250.

paid or secured the sum of £3000 on her marriage, this is the clearest evidence that it was his own liability he was taking into account. He could not make a person elect unless he gave something of his own. Apart from this the same principle applies to protect a co-debtor as to protect a surety. That principle is that the surety, if he pays the principal's debt, is entitled to the entire securities the creditor has, so that he may be able to recoup himself out of them; the creditor cannot do anything to compromise these securities; if he does the surety must be released, because he is deprived of the equity, which he would otherwise have, to recoup himself by means of these securities: see *Newton* v. *Chorlton* (1). Otherwise the result would be that the father's estate having been entirely released, the son would have to bear the entire burden.

This principle applies equally to the case of co-obligors. This is settled both by statute law and decisions. It is really a branch of the law of principal and surety. The release of one co-obligor releases the rest: see *Evans* v. *Brembridge* (2). At any rate each of them is primarily liable only for his own share; as to the other shares he is entitled to the very relief a surety ordinarily has against a principal: see *Batchellor* v. *Lawrence* (3), and the judgment of Byles, J., at p. 555; see also the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), sect. 5. The limit of suretyship must apply with regard to one moiety at least. The creditors have destroyed the only security the co-obligor could get, that is by the release: *Forbes* v. *Jackson* (4). As to the judgments being separate, see *Dering* v. *Earl of Winchelsea* (5).

G. W. Walker, for the petitioners:—

There were two separate judgments entered up. To the settlement of 1843, relied on by Mr. Oulton, Francis John Gervais was not a party, and, even if the recitals were clear, they would not be evidence againt persons not parties to the deed. It would be evidence if there were a question before a jury as to election, but not against Francis John Gervais when it is sought to make him a surety. *Robinson* v. *Gee* (6) is not an anthority in Mr. Oulton's

(1) 10 Hare, 646, at p. 650.
(2) 2 K. & J. 174.
(3) 9 C. B. (N. S.) 543.
(4) 19 Ch. D. 615.
(5) 1 Cox Ch. Cas. 318.
(6) 1 Ves. Sen. 250.

Ross, J. 1903.

In re GERVAIS' ESTATE.

favour; it is the converse of this case, and in that case there was evidence of an agreement. As to the argument that the £3000 must be given by the father, if it were not there would be no election. Under his will the Rev. Francis Gervais gives benefits to each of his daughters, so there is ample in the will to raise the question of election.

The same law is not applicable to co-obligors and co-debtors as to principal and surety. There is no evidence here to show that the relationship was that of principal and surety. Assuming they were co-debtors, there is no case to show that if time is given, or any portion of the security of one co-debtor is released, the other is let off: see *Ex parte Trueman* (1). It is the persons who release the security who cause the injury, and there would be a cause of action against them. *Ex parte Trueman* (1) shows what the law was before the Mercantile Law Amendment Act. *Swire* v. *Redman* (2) is a case subsequent to that statute. These cases show that co-debtors are not in the same position as principal and surety.

Oulton:—

The case reported in Deacon and Chitty turned on the Bankruptcy Law (see page 478), and does not affect this case. A surety is entitled to recover the whole, a co-debtor only a moiety; but the principle of equity is the same, that the creditor must retain any security he has for the benefit of the surety: see *Nicholson* v. *Revill* (3).

Swire v. *Redman* (2) only shows that a right of action exists, and contains no reference to the question of the destruction of the securities at all. [Smith's Mercantile Law (10th ed.), p. 592, was also cited.]

J. H. Shaw, for the owner.

S. L. Brown, K.C., in reply.

Jan. 27.

Ross, J.:—

This is an objection to the final schedule filed on behalf of Francis Nicholas Evans, who claims under a settlement, dated

(1) 1 Deac. & Chitty's Rep. 464. (2) 1 Q. B. D. 536. (3) 4 A. & E. 675.

the 8th of May, 1843, executed on the marriage of his mother Catherine Gervais with Nicholas Evans. The objector is the only child of the marriage. The father of Mrs. Evans was the Rev. Francis Gervais, and her only brother was Francis John Gervais. The marriage settlement of her father the Rev. Francis Gervais contained certain provisions for the benefit of his younger children, by virtue of which she would have been entitled to a charge for £3000, secured by a term of years, on the townland of Tamlaght. As soon as the trusts of the term were satisfied the townland would become the absolute property of the Rev. Francis Gervais. The marriage settlement of 1843 contains a recital that the marriage portion of Catherine Gervais should be £3000, for which the Rev. Francis Gervais and Francis John Gervais had executed their joint and several bonds, with warrant of attorney for confessing judgment thereon, in the penal sum of £6000, conditioned for the payment of £3000 with interest, which said sum of £3000, it was declared and agreed, should be accepted in full discharge of all claims of the said Catherine Gervais. By his will, made subsequently, the Rev. Francis Gervais put his daughters to their election, and it is no longer contended that Mrs. Catherine Evans, or any of them, have now any claim on the lands of Tamlaght. Judgment was marked on each bond separately. By a deed of the 23rd of July, 1845, certain judgment creditors of the Rev. Francis Gervais, including the trustees of this settlement, in order to enable him to raise a loan of £22,000, released certain townlands that were his property. The release contained a proviso that nothing therein should be deemed to affect the rights of the judgment creditors to the other estates of the Rev. Francis Gervais.

As the law then stood, before the 11 & 12 Vict. c. 48, this proviso was wholly inoperative, and all the lands of the Rev. Francis Gervais became exonerated: *Handcock* v. *Handcock* (1). Now, if Francis John Gervais were only a surety for his father the Rev. Francis Gervais, it is plain that the release which discharged the principal discharged the surety also.

It has been argued that from the very nature of the case,

(1) 1 Ir. Ch. R. 444.

Ross, J. 1903. *In re* GERVAIS' ESTATE.

from the recitals in the settlement, and from the will of the Rev. Francis Gervais, I ought to infer that the relation between the father and son at the date of the settlement was that of principal and surety. Even if the settlement and will were evidence against the objector, I do not think an inference can be legitimately drawn as to their relationship at the date of the settlement.

What then is their real position? They are co-debtors, jointly and severally liable to the creditor. The question I have to decide is whether the release to the Rev. Francis Gervais operated to discharge Francis John Gervais, the co-debtor, also. It has been argued that the result in law is the same as if Francis J. Gervais had merely been a surety. This leads me to consider the difference between a case where the relationship of principal and surety exists and a case where both are principals or co-debtors.

In the case of suretyship any agreement between the creditor and the principal with reference to the contract guaranteed, to which the surety is not a party, discharges him. It may be a trifling alteration, or an alteration that may even be to the advantage of the surety; that is a matter for the surety alone. The materiality of the alteration cannot be submitted to a jury; and, unless in a case where it is self-evident that the alteration can under no circumstances injure the surety, the very fact of alteration discharges the surety. The contract guaranteed must be kept in its original condition. And why? The surety has the right at any time to pay off the creditor and to step into his shoes. He can sue in his name. He can even lay hands on a further security obtained by the creditor after the contract of suretyship. This being his right, the creditor cannot bind himself to give any concession to the principal debtor infringing that right. Any infringement of that right, as the law stands, effects the complete discharge of the surety.

We now come to consider the position of two co-debtors jointly and severally liable. Each is liable for the entire debt, with the right to enforce contribution to the extent of one-half, from the other; that is to say, each is under any circumstances liable for the half, and he is surety to the creditor for the other half. If the creditor releases one co-debtor, that act discharges the other

co-debtor in so far as he is a surety, that is to the extent of one-half; but it is self-evident that this act could not in any way work to the prejudice of the co-debtor in respect of the other half. The creditor has disabled himself from being able to recover the whole debt from him. Where the co-debtor cannot be injured by the release it would be unequitable to relieve him from all liability. His own half of the debt still remains unsatisfied.

I therefore declare that the judgment affecting the land of Francis J. Gervais is to be deemed to be a security for half the original debt, that is to the extent of £1500, and all interest due thereon, and it is to be accordingly put in its proper place on the schedule as such security.

Solicitor for the objector: *Beauchamp.*

Solicitors for the Misses Gervais: *Longfield, Kelly, and Armstrong.*

Solicitors for the owner: *Longfield, Kelly, and Armstrong.*

Solicitors for petitioners having carriage: *A. O. B. O'Conor & Son.*

W. C. S.

SHARPE *v.* M'CALL.

(1902. No. 1119.)

Power of appointment—Creation by will—Contemporaneous execution by will of donee—Death of donee in lifetime of donor—No power in existence at time of attempted execution—Invalidity.

A testator directed that a sum of £1000, which he bequeathed to her, should be paid to his wife if living at his decease, and, if dead, that same should be paid to such persons as she by will should appoint; and in case of her not having made any disposition of same as before mentioned, that the said sum should go to whoever would be entitled as her next-of-kin, as of a person dying intestate and unmarried.

By her will of the same date, appointing the same executors, and attested by the same witnesses, as her husband's will, the wife, after referring to the power, in exercise of it, bequeathed the said sum:—

Held, that the appointment failed, and that the fund went to the wife's next-of-kin.

Jones v. *Southall* (32 Beav. 31) followed and approved.

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SHARPE *v.* M'CALL.

ORIGINATING SUMMONS.

By his will, dated the 20th August, 1890, Thomas M'Call directed that his real and personal estate should be sold, and all moneys belonging to him lent out or invested at interest should be called in and invested in bank along with the moneys to arise out of the sale, and then proceeded: "And upon such moneys being collected and invested, I hereby direct that thereout the sum of one thousand pounds, which I hereby bequeath to her, shall be paid to my dear wife Margaret M'Call, if living at the time of my decease, and if dead, that same sum shall be paid to such person or persons as she by will or any writing in the nature of a will shall in her lifetime direct and appoint, my intention being that my wife shall after my death have said sum of one thousand pounds at her absolute disposal. And in case of her not having made any disposition of same as before mentioned, that said sum of one thousand pounds shall go and be divided to and among whoever would be entitled as her next-of-kin, as of a person dying intestate and unmarried." He bequeathed out of the residue of said moneys, after payment of said sum of one thousand pounds to his said wife as aforesaid, to his brother George M'Call £300, to his sister Gordon Harper £300, to his sister Christiana Harper £300, to his sister Marion Burgess £300, and declared that in case of the death of any of them in his lifetime the respective sums so bequeathed to them respectively should be paid to such persons as would be entitled to the same as their next-of-kin; and after bequeathing pecuniary legacies to Thomas M'Call Sellar and Margaret Little, he appointed the said George M'Call, Gordon Harper, Christiana Harper, Marion Burgess, or their representatives as aforesaid, if any of them should be so deceased as before mentioned at the time of his death, as also the said Thomas M'Call Sellar and Margaret Little, his residuary legatees, in proportion to the sum so bequeathed to each, and he appointed John Sharpe, John Jackson, and James Moore executors.

The witnesses to the will were James M'Call and John M'Gill.

The testator's wife Margaret M'Call made her will, also dated the 20th August, 1890, so far as material, as follows:— "Whereas by the last will and testament of my husband Thomas M'Call, made the 20th day of August, 1890, I am entitled to a

sum of one thousand pounds, with absolute power to bequeath or dispose of same as I may think proper, now in exercise of the power of appointment therein conferred upon me, I hereby will and bequeath to my niece Maggie Little, of Ballypatrick, the sum of one hundred and fifty pounds, to my brother Matthew Little I bequeath the sum of one hundred pounds, to my sister Isabella Little I bequeath the sum of one hundred and fifty pounds, to my sister in-law Jane Little I bequeath the sum of one hundred pounds . . ., and to my sister-in-law Beatrice Little . . . I bequeath the sum of one hundred and fifty pounds . . ." and the testatrix appointed the said John Sharpe, John Jackson, and James Moore executors.

The witnesses to the will were the said James M'Call and John M'Gill.

Margaret M'Call died on the 31st August, 1890.

Thomas M'Call made a codicil, dated the 1st February, 1895, whereby he left certain legacies, and altered the legacy given by the will to his brother George.

Thomas M'Call died on the 18th April, 1899.

Probate of his will was on the 19th July, 1899, granted to his executors.

On the 25th September, 1901, probate of the will of Margaret M'Call was granted to the same persons.

This summons was taken out in the matter of the estate of Thomas M'Call and in the matter of the estate of Margaret M'Call, by the said executors as plaintiffs, against George M'Call, Margaret Little, and Elizabeth Murray, as defendants, for the determination of the following questions:—(1) Whether the will of Margaret M'Call was a valid exercise of the power of appointment purported to be conferred upon her by the will of Thomas M'Call with respect to the said sum of £1000; (2) whether the plaintiffs should pay the said sum to the persons appointed by the will of Margaret M'Call; (3) whether the plaintiffs should pay the said sum to the next-of-kin of Margaret M'Call, or how otherwise.

The defendant George M'Call was sued as a residuary legatee of Thomas M'Call, the defendant Margaret Little as an appointee under the will of Margaret M'Call, and the defendant Elizabeth Murray as one of the next-of-kin of the latter.

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SHARPE v. M'CALL.

Chambers, *K.C.*, for the plaintiffs.

Denning, for Margaret Little:—

This case is distinguishable from *Jones* v. *Southall* (1). There the testatrix contemplated that her husband would survive her; it did not appear that he was aware of the power, and his will contained merely a general bequest. Sir John Romilly, M.R., in his judgment (p. 39), says:—"But it is obvious that no intention can be presumed respecting the execution of a power of the existence of which the testator is ignorant."

In the present case, on the face of the will of Thomas M'Call, there is an intention expressed that the power is not to lapse—in fact the power is given to his wife only in the event of her dying before him. Further, here it is not a question of presuming an intention to execute the power: the wife's will expressly refers to the power and purports to exercise it. Both wills are of the same date, the witnesses are the same, the executors the same. This points to the making of the wills being one transaction. Effect should be given to the provisions of Thomas M'Call's will conferring the power—they should not be treated as wholly nugatory.

Pigot, for Elizabeth Murray:—

The power purported to be given to Margaret M'Call could have had no existence until the death of Thomas M'Call gave validity to his will: *Jones* v. *Southall* (1), and the judgment there (p. 38) of the Master of the Rolls. At that time, however, the testator's wife was dead, and could not exercise it. At the dates of her will and death the power had never arisen and could not be exercised by her: she was not then the donee of any power, but merely the intended donee named in a will which had not come into operation.

Although the attempted appointment was inoperative, the gift in default took effect, and Margaret M'Call's next-of-kin are entitled: see *Webb* v. *Sadler* (2); *Peacock* v. *Frigout* (3).

Littledale, for George M'Call:—

Margaret M'Call in expressed exercise of the power conferred on her by her husband's will disposed of the sum in question. She did everything she could to make a valid appointment.

(1) 32 Beav. 31. (2) L. R. 8 Ch. 419. (3) [1893] 1 Ch. 54.

That appointment failed, but it cannot be said that she did not make any disposition of the money; the gift over "in case of her not having made any disposition" did not take effect, and the fund falls into the residuary estate of Thomas M'Call.

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SHARPE *v.* M'CALL.

THE VICE-CHANCELLOR :—

March 11.

The question here arises on a will which in every respect except one is clear. It appears that Thomas M'Call and Margaret, his wife, agreed to make mutual wills to be executed on the same day, both bearing date the 20th August, 1890. The wife died on the 31st August, 1890, and the husband lived to the 18th April, 1899. The will of Thomas M'Call, on which the question arises, left a sum of £1000, as to which only the question arises, in the words following. [His Lordship read the clause.]

This bequest contemplates three possible events.—The first, the wife being living at the death of the testator; the second, her having predeceased the testator and having made a disposition by will, or some writing in the nature of a will, dealing with the said sum by way of direction or appointment, and he declares his intention to be that his wife shall after his death have the said sum of £1000 at her absolute disposal; and the third event being his surviving his wife, and her not having made any disposition of the same as before mentioned, in which event he directs that said sum of £1000 should go to and be divided amongst whoever would be entitled as her next-of-kin, as of a person dying intestate and unmarried. The second event is the only one which creates a difficulty. It raises the question whether the will of the husband can operate as a disposition of this sum in the events that have happened. The leading object of the testator was that his wife should in any event have this sum of money or the absolute right to dispose of it. The method of her disposing of it was by will, or a writing in the nature of a will. She made a will purporting to dispose of it, but it was made in her husband's lifetime, and could not become operative till his death. But she died before he did, and therefore she never had the power to dispose of this fund unless her will can be taken as having done so.

The question, in my opinion, comes to this, whether the power of appointing the persons to whom the said sum of £1000 should

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be paid in the event of the wife not surviving her husband has been validly exercised. The wife purported by her will to exercise this power, and such appointment as made by her will would have been valid and effectual but for this, that she died in the lifetime of her husband. If this was the appointment of a sum of money it would necessarily have lapsed by her predeceasing him. It was contended that this right to nominate the persons who were to take the £1000 in the prescribed event was different, and did not come within the doctrine of lapse. But the case of *Jones* v. *Southall* (1), before Sir John Romilly, is an authority against this contention. He so held there on the ground that no power created by will had any existence until the death of the testatrix had given validity to the instrument itself, stating that it was the first time he remembered it to have been argued that a man could execute a power of which he was intended to be the donee named in the will of a person who survived him. He added that the testator can by his will execute only such powers as are in existence when his will takes effect; that he was not the donee of any power at his death, the time at which his will begins to speak, and unless he had survived the testatrix he never could have become the donee of a power created by her will which has no operation except from the day of her death.

This, in my opinion, applies to the present case. The power here under which only the wife could act was given by the will of the husband, and he did not die till several years after the death of the wife. Consequently she was not the donee of the power, and the gift of the power to the wife lapsed, in my opinion, by her death in the testator's lifetime, and she therefore never had authority to nominate the persons to take.

I regret that I cannot give more complete effect to the strongly expressed wishes of the testator, but the clear decision of Sir J. Romilly in the case I have cited, in the reasons for which I concur, prevent my doing so.

I must, therefore, hold that the supposed appointment failed, and that the £1000 legacy went as in default of appointment.

Solicitor for the plaintiffs: *Woodside.*

Solicitors for the defendants: *William M. Moore & Sons.*

D. M'C. M.

(1) 32 Beav. 31.

GALVIN *v.* DEVEREUX.

(1902. No. 884.)

M. R.
1903.
Feb. 23.

Will—Election—Devise of "all my estate and interest in the lands of H."—Intention of testator—Parol evidence.

A testatrix devised all her estate and interest in the lands of H. to A., and appointed B. residuary legatee. She had no power to dispose of the lands of H., which were settled by her husband's will on herself for life, with remainder to B. in fee:—

Held, that the testatrix only intended to dispose of her estate and interest, if any, and not to dispose of property which was not her own, and that therefore no case of election arose.

Whitley v. *Whitley* (31 Beav. 173) distinguished.

Parol evidence of the intention of the testatrix not admissible.

TRIAL OF ACTION. This action was brought by Anne Galvin as legatee under the will of Samima Devereux, widow of J. D. Devereux: (1) to have it declared that J. D. Devereux was a trustee for Samima Devereux of the lands of Hogan's Hill, situate at Ballyrankin, in the county of Wexford; and (2) in the event of it being held that the lands of Hogan's Hill were not the property of Samima Devereux, to have it declared that the defendant Nicholas J. Devereux, a legatee under the will of Samima Devereux, must elect to take under or against the will, and if he elected to take against the will that the plaintiff be declared entitled to compensation in respect of the said lands of Hogan's Hill.

The facts of the case, so far as they are material, were as follows:—On July 29, 1897, J. D. Devereux purchased from Thomas Kidd the lands known as Hogan's Hill at Ballyrankin, in the county of Wexford, for £100, the conveyance being in the form of a grant in perpetuity at 1*s.* a-year. By his will, dated May 3, 1898, J. D. Devereux, after making the several bequests therein contained (which included a bequest to his wife of a sum

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of £2500, stated by the testator to have been advanced by her to him out of her own moneys), devised and bequeathed all his residuary estate (which included the said lands known as Hogan's Hill) to his wife for life, with remainder to his brother, the defendant Nicholas J. Devereux. On his death on May 4, 1898, Samima Devereux, his widow, entered into possession or receipt of the rents of the said lands known as Hogan's Hill, together with the rest of the residuary estate of her husband, as tenant for life under his will, and so continued till her death on December 16, 1901. The lands of Hogan's Hill were near the residence of J. D. Devereux at Ballyrankin; he built a cottage on part of the lands, and let it to a gardener in his employment at £7 a-year.

Mrs. Devereux made her will on January 14th, 1901, and thereby bequeathed to the plaintiff Anne Galvin, her confidential servant, the interest on a sum of £2500 charged on the Ballyrankin estate for life, and after the death of the plaintiff bequeathed the said charge of £2500 to the person entitled beneficially to the Ballyrankin estate, namely, the defendant N. J. Devereux. She also bequeathed to the plaintiff all moneys she might have on deposit account at the National Bank, Newtownbarry, and in the Post Office Savings Bank at Newtownbarry, and any furniture in Ballyrankin House which she might elect to take, except any articles specifically bequeathed, also her pony and trap. The will then proceeded as follows: "I devise and bequeath to the said Anne Galvin all my estate and interest in all that and those the lands and premises known as Hogan's Hill at Ballyrankin, purchased from Mr. Thomas Kidd by the late Mr. J. D. Devereux." The testatrix then gave sundry legacies to other persons, and appointed the defendant Nicholas J. Devereux her residuary legatee, and appointed the defendants G. B. Symes and A. H. Wynne her executors, who proved the will on April 11th, 1902.

At the trial the only question was as to whether a case of election arose, the claim to have it declared that Mr. Devereux was a trustee for his wife being given up as there was no evidence to sustain it.

R. F. Todd (*Matheson, K.C.*, with him), for the plaintiff :—

The testatrix believed that she was owner of Hogan's Hill when she made her will, and intended to dispose of it by her will. Parol evidence can be given to rebut the presumption which exists, that a testator by his will intends merely to dispose of that which belongs to him: *Pickersgill* v. *Rodger* (1), and such evidence is forthcoming. The use of the words "all of my estate and interest" is an ordinary way of giving property which a person has. The words "all my estate and interest in Hogan's Hill" are only descriptive of Hogan's Hill; the testatrix thought she had a devisable interest in it. The only case that bears on the point is *Whitley* v. *Whitley* (2). There the wife of a testator was entitled to a share of the R. property; the testator gave all "his share, estate, and interest" in the R. property to his daughter, and benefits out of his own estate to his widow; it was held that the will raised a case for election against the widow.

The plaintiff was examined, and deposed that she had a conversation with Mrs. Devereux before she made her will. [Her evidence and that of Mr. T. B. Moffat, hereinafter mentioned, was objected to, and received subject to objection.] She said that she intended leaving Hogan's Hill to her if she had power to do so. She told her after she had made her will that she had left it to her.

Mr. T. B. Moffat, solicitor, was then examined. He deposed that he prepared a draft will for Mrs. Devereux, and sent it to her. She came to see him and mentioned Hogan's Hill, and told him she wished to give Hogan's Hill to Mrs. Galvin.

He told her that he understood that she was only tenant for life of Hogan's Hill under her husband's will. She said that she was entitled to it. He said that he had better make a devise of whatever interest she had in Hogan's Hill, and he drew the will as it now stands. He saw her afterwards and read her husband's will, and pointed out that she was only tenant for life under it. She said she wished the provision to stand, as she wished Mrs. Galvin to have it. She executed the will then.

(1) 5 Ch. D. 170. (2) 31 Beav. 173.

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GALVIN v. DEVEREUX.

Wakely, K.C., and *A. C. Meredith*, for the defendant N. J. Devereux:—

The parol evidence if admissible is in favour of the defendant. It shows that the insertion of the particular words in the will was intentional in order to dispose of the interest the testatrix had, if any. This is what we say the words mean.

But parol evidence is not admissible: *Streatfield* v. *Streatfield* (1); Jarman on Wills, p. 425, where it is pointed out that the *dictum* of Sir G. Jessel in *Pickersgill* v. *Rodger* (2) is not in accordance with the later authorities.

[THE MASTER OF THE ROLLS stated that he would not decide the case on the parol evidence.]

The sole question then is on the construction of the will. *Prima facie* it is not to be supposed that a testator disposes of what is not his own; it rests on the person alleging that a case of election arises to show that there is a clear manifest declaration of intention to dispose of the property of another: *Doe* v. *Chichester* (3); *Cooper* v. *Cooper* (4); *Minchin* v. *Gabbett* (5). The words "estate and interest" mean "estate and interest, if any." In Coke upon Littleton, 19th ed., 345 *a*, in the note on the words "grant his estate," it is laid down that "state or estate signifieth such inheritance, freehold, term of years, tenancie by statute, merchant, staple, elegit, or the like, as any man hath in lands or tenements, &c." The testatrix indicates that she means only to dispose of what was her own, because she says "my estate and interest," *i.e.* "if I have any." If she had devised "the lands of Hogan's Hill" a case of election would have arisen, or if she had devised her estate and interest in them to, say, A for life, with remainder to B in fee, there would in either case have been a clear indication of intention to dispose of what was not her own. *Whitley* v. *Whitley* (6) is not in point. There the testator gave his share, estate, and interest to one person for life, with remainder to another in fee, and so defined what he meant by his share and interest. Here the testatrix had only a life interest under her husband's will. The only disposable interest

(1) 1 W. & T. 428.
(2) 5 Ch. D. 170.
(3) 4 Dow, 76.
(4) L. R. 7 H. L. 71.
(5) [1896] 1 I. R. 1.
(6) 31 Beav. 173.

she could have had was a proportionate part of the gale of rent payable by the tenant of the cottage. If a testator has only a partial interest in a property the Court will not infer an intention to dispose of the whole property, though it may suspect that the testator intended to do so: *Maddison* v. *Chapman* (1). So where a person had an undivided seventh share of a property in a particular place and devised his property in that place, it was held that no case of election arose, as the words were referable to his one-seventh share: *Henry* v. *Henry* (2).

Corvan, for the executors of Mrs. Devereux.

Matheson, K.C., in reply:—

A case of election arises both on the will and on the parol evidence. Cases as to a partial interest do not apply where the testatrix had no disposable interest. It is absurd to suggest that she had a partial interest in an apportioned part of the tenant's rent. She was tenant for life only of the lands, and she made a will disposing of all her estate and interest in them. She plainly intended to dispose of the lands. *Whitley* v. *Whitley* (3) is undistinguishable. The testator there had no interest. Here the lands are identified by a deed which, in fact, passed the fee. The parol evidence, if admissible, shows that it was the testatrix's intention to give Hogan's Hill to the plaintiff.

THE MASTER OF THE ROLLS:—

The point is a very short one, whether considered in the light of the will alone, or of the parol evidence as to the will in addition. The first is the legal way of treating the case. I did not prevent parol evidence being given to show that Mrs. Devereux treated the property as her own, but I allowed it to be received, subject to objection, because the case might go further, and it might be held that the evidence should have been received. The first thing to be observed is that under her husband's will Mrs. Devereux was only tenant for life of Hogan's Hill, and that she had no power to dispose of it. It was suggested by Mr. Wakely that Mrs. Devereux might at the time of her death be

(1) 1 J. & H. 470. (2) I. R. 6 Eq. 286. (3) 31 Beav. 173.

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entitled to an apportioned part of the rent payable for the cottage built on the lands of Hogan's Hill, and so she would have that small amount of disposable interest in Hogan's Hill; but that was a trifling matter and would not satisfy the words of the will. The next point to be observed is that, subject to the life estate of Mrs. Devereux, Mr. Nicholas J. Devereux, the defendant, was the owner of Hogan's Hill. The question is whether Mrs. Devereux having no estate or interest in Hogan's Hill, a devise by her of "all my estate and interest in the lands known as Hogan's Hill, purchased by the late Mr. J. D. Devereux," was a disposition by her of property which was not her own, and so raised a case of election against the defendant Nicholas J. Devereux, who took considerable benefits under her will, as also did the plaintiff, to whom several legacies pecuniary and specific were given. It is admitted that if a case of election arises and the defendant elects to take against the will, there is an ample fund for compensation. If the question had to be decided on that devise, as explained by the parol evidence, there could be no doubt on the point. [The Master of the Rolls here referred to the parol evidence.]

But I am of opinion that the parol evidence should not be taken into consideration; I admitted it partly because, as I thought before hearing it, it might explain matters of fact as to the property. The question then turns wholly on the meaning of the clause in the will.

Only one case has been referred to as having any bearing upon it (*Whitley* v. *Whitley* (1)), which I shall notice presently. The clause in the will before me is as follows:—"I devise and bequeath to the said Anne Galvin all my estate and interest in all that and those the lands and premises known as Hogan's Hill at Ballyrankin, purchased from Mr. Thomas Kidd by the late Mr. J. D. Devereux." It has not been argued that the last words of the devise, "purchased from Mr. Thomas Kidd by the late Mr. J. D. Devereux," are to be connected with the words "all my estate and interest." It is admitted that they merely describe and identify the property described as "Hogan's Hill at Ballyrankin." The question is, is a devise by a testatrix of all her estate and interest in lands

(1) 31 Beav. 173.

in which she has no devisable interest, an attempted disposition of the fee-simple of the lands. If it is only a disposition of her estate and interest in the lands if any, no case of election arises. If the testatrix had said, "All my estate and interest which is a fee-simple or consists of a rentcharge," no question would arise. The words "all my estate and interest" mean the estate and interest which, as a matter of fact, I have. If such words occurred in a contract for the sale of lands, there could be no decree for specific performance further than the actual interest, whatever it was, which the vendor had. The terms would be too vague to support a claim to a conveyance in fee. If a case of election did arise, and the defendant elected to take against the will, on what basis would the compensation which he would have to pay be assessed? Would it be on the basis of the fee-simple, for which it appeared that £100 was paid? The answer is that Mrs. Devereux had no interest in the property beyond her own life. She had only a life interest in it. The distinction between *Whitley* v. *Whitley* (1) and the present case is clear. The words "estate and interest" occurred in the will in that case, but there was more. There Elizabeth Davies, the wife of John Davies, was entitled under her father's will to one-fifth of the proceeds of an estate called Rhydgoled, which had been directed to be sold, but remained unsold. John Davies by his will, made in 1857, gave to his widow his personal estate absolutely, and certain interests in his real estate, and proceeded in the following terms:—"And as to and concerning *all my share, estate, and interest* in the Rhydgoled property, and the house and shop in High-street in Mold, and also as well in the yearly rents thereof as in the moneys that may arise from the sale of the said property, I give, devise, and bequeath the same unto my said wife, for her own use and benefit for the term of her natural life, and from and immediately after her death I give, devise, and bequeath the same and every part thereof unto my daughter Sarah Davies for her own use and benefit absolutely for ever." It is to be observed that though the testator there only purported to dispose in the first instance of all his share, estate, and interest in the particular

(1) 31 Beav. 173.

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property, he defined that estate by limitations which disposed of the whole fee. It was as plain as if he had given it to his wife and her heirs for ever. He disposed specifically of the fee. The will was proved by the widow, who accepted the benefits given to her by the will and deed. Afterwards her executors and heir-at-law contended that the will did not create a case of election. The Master of the Rolls said :—" I am of opinion that this will raises a question of election. John Davies intended to dispose of this property by will. It was not his, but it belonged to his wife, and she having taken and enjoyed the benefits provided for her under his will and acted under it, must be considered as having elected. This property must therefore go as if it had been John Davies' property." That was a correct and inevitable decision in the particular circumstances of the case, and is no authority in the present case. I am of opinion that here the testatrix must, on the words of her will, be taken to have disposed of her own estate and interest if any, and whatever it was, and not the fee-simple of the lands. She had no interest in the lands, and nothing passed under the devise, and therefore no question of election arises. As the difficulty was manifestly caused by the testatrix, the costs must come out of the residue.

Solicitor for the plaintiff: *John A. Sinnott.*

Solicitors for the defendant N. J. Devereux: *W. R. Meredith & Son.*

Solicitor for the defendants Wynne and Symes: *T. B. Moffat.*

W. L.

SULLIVAN *v.* SULLIVAN.

(1902. No. 1101.)

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1903.
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Will—Secret trust.

A testator left all his property to his wife, resting satisfied that she would faithfully carry out his wishes regarding the same in the interest of their children, the particulars of which she was aware of. The will was witnessed by two of the children. The testator about the same time wrote a letter addressed to his wife, which stated his wishes as to the disposal of the property he had left to her by his will, and contained the following sentence:—"I think this disposition is as fair as I can make it, and I hope it will satisfy all; but you, of course, may modify it if you think or find it desirable." Shortly afterwards the testator read out the will and letter in the presence of his wife and children, and she acquiesced in it:—

Held, that the circumstances were such as would make the letter a binding trust, if it were intrinsically capable of creating a trust; but that, by reason of the sentence in question, there was no binding trust.

ADJOURNED SUMMONS.

Marcus Clement Sullivan by his will, dated August 2nd, 1897, appointed his wife Charlotte Sullivan executrix, and bequeathed to her all his property, resting satisfied she would faithfully carry out his wishes regarding the same in the interests of their children, the particulars of which (his wishes) she was aware of. The will was witnessed by his son Edward Stewart Sullivan, and his daughter Clementina Mary Sullivan. The testator died on April 5th, 1902, without having revoked or altered his will, which was proved by his executrix on May 20th, 1902. After the death of the testator his will was found in an envelope, which also contained a letter in his handwriting addressed to his wife, dated July 31st, 1897, which was as follows:—

"MY DEAR CHARLOTTE,—I have been putting off making my will since Dan's death, principally on account of the difficulty in getting executors who would take an interest in our affairs, but now that I am about to take this

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trip to Switzerland I think it right to leave my affairs settled, not that I have any presentiment of anything happening, as I trust in God who has been so good to me all my life that He will protect me and the girls through our journey, and bring us home again with renewed health. But if it should please God to call me, I desire no unnecessary expense may be incurred by my funeral, and if I should die abroad I am to be buried there. If at home you will find the cemetery papers enclosed. In a previous will I appointed Dan and Edward executors, but as circumstances are changed, I have decided on leaving everything to you and appointing you my sole executrix.

"This applies not only to my assets, but also to my reversionary interest in my brother Dan's estate, and I write this memorandum for your guidance in carrying out my wishes regarding the same. Mr. Denning, my solicitor, will advise you on legal matters, and will carry out the necessary formalities of getting probate, etc., of my will. You will have Edward to consult, and your brother will, no doubt, advise you if you find it desirable to ask him. Messrs. Wright, my stockbrokers, have been always kind, and will tell you what is best to do with the shares. My esteemed friend Joe Woodworth will, I am sure, undertake the accounts, but he must do so only by accepting his usual professional fees, he having done enough for me from friendship sake.

"Now, the reason I make my will in this way is, you will not have to sell out the investments unless you are advised as an act of prudence to do so, and any of them you sell you will have the power of reinvesting in other than Government securities. There are many safe debentures and preference shares which return at least four per cent. interest. With reference to Dan's estate, you will get advised whether you should allow the present investments to stand or sell them and put the proceeds in Government funds, or such other securities sanctioned by law. In the event of letting them remain you will have to get a written consent from Mrs. E. C. Sullivan (Mr. Denning will see to this for you). As to my wishes for the disposal of our property, you will have to get your will made as soon as you can, and ask your brother to act as executor with Edward, and if you can get another as well it would be advisable. I wish the following arrangement to be made in the meantime, that is on my death. Out of the proceeds of the insurances on my life in the Scottish Widows' Society (the policy of which is deposited with the Society), and the Provident Clerks' Association when realized you are to give Edward £500. This will enable him, I hope, to stock his farm and pay you the interest on the mortgage for £1200, which I have on Ballinakill; the rest of the money I advanced to him and the interest due on it is a gift, and does not count in my assets. You will give Robert £500, which will give him a start in business, perhaps in partnership with his cousin. If you should hear from Lewis within two years from my death (otherwise you may assume he is dead), you will give him £500, and £50 due him as his uncle's bequest. The money I lent him is a gift. If any of the girls should marry in your lifetime, you can give her or them such portion as you think right, and by your will I wish you to dispose of the

remainder of my assets as follows:—that is, my own property apart from Dan's. Clemmie to have this house (No. 26), Kittie to have No. 27, and Violet to have Castlefield. Three-fifths (3/5ths) of the net residue of the assets to go to them (the three girls) share and share alike. If any of them should die unmarried in your lifetime, her share should go to the survivors or survivor of the three. The remaining two-fifths (2/5ths) you should leave to Lewis, Edward, and Robert share and share alike, provided Lewis should be heard from in the meantime, if not his share to go to the other two. The mortgage on Ballinakill you may either surrender to Edward (by your will) or dispose of otherwise in your discretion, and as circumstances demand. Now, as to the reversion of Dan's assets, my intention is, if I should outlive Mrs. Sullivan, to divide the net proceeds as follows, which I think would be in accordance with my brother's wishes, namely, the net amount to be divided into [ten] *nine* shares [one-tenth or one share is to be given share and share alike to my nephews Robert Dyer Sullivan, Marcus W., and their sister Fanny, and my nephew William], one share to go to Lewis, provided he be living at the time of distribution, one share to Robert, and one share to Edward, two shares to Clemmie, two shares to Kittie, two shares to Violet. The above [ten] *nine* shares not to include Glen Albyn or Pembroke House, if any beneficial interest should remain in the latter, both of which are to go to Violet to put her on the same level as Clemmie and Kittie."

[The above words in brackets were struck out after the letter was read out, and the word "nine" substituted, and the words "cancelled, July 5, '98," written in the margin].

"I think this disposition is as fair as I can make it, and I hope it will satisfy all, but you of course may modify it if you think or find it desirable.

"I add a list of my investments, the certificates for which are in my tin box, and with Messrs. Wright, as noted on list.

"If Mrs. Jackson should die before you, get Mr. Denning to look after your interests in the property.

"Written on the eve of the 37th anniversary of our marriage.

"Your loving husband,

"MARCUS.

"*July* 31*st*, 1897.

"Revised July 5th, 1898.
"Do. January 3rd, 1899."

In the month of August, 1897, the testator came into the dining-room of his house 26, Highfield-road, Rathgar, where his wife was, together with her son Edward, and her daughters Clementina, Kathleen, and Violet, and in the presence of all of them read aloud the said will and letter. Mrs. Sullivan could not say upon what precise date in August this interview took place;

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she had no recollection of ever having been told by her husband anything as to the alterations which appeared to have been subsequently made in the letter, or of his ever having mentioned anything whatsoever as to the contents of the letter save on the occasion before mentioned, and upon one other occasion early in the year 1902, after the death of her stepmother Mrs. Jackson, when she became entitled to certain property, when he spoke to her about making her will, and said: "Remember I have left everything to you."

When the letter was read Mrs. Sullivan made no objection, and expressed no dissent. Clementina Mary Sullivan was married to John S. B. Vanston on January 25, 1899, and by the settlement made on the occasion of her marriage with him the testator covenanted with the trustees of the settlement that he would during his life or his executors would within twelve months after the death of the survivor of himself and his wife pay to the trustees a sum not less than £2000, and also would during his life, or his executors would within twelve months after the death of the survivor of himself and his wife pay to the trustees a sum of £1000 on the trusts therein mentioned. On April 3, 1902, the testator released to his son Edward the mortgage for £1200 on Ballinakill mentioned in the said letter. Elizabeth Carleton Sullivan, mentioned in the said letter, was the widow of the testator's brother Daniel Sullivan, in the letter described as "Dan," and, subject to her life estate, the testator was entitled under his brother Daniel's will to all his property. Mrs. Sullivan was desirous of carrying out her husband's wishes so far as she could do so; but questions having arisen as to whether the said letter constituted a declaration of trust binding on Mrs. Sullivan, and if so as to what were the trusts declared thereby, a summons was taken out on December 4th, 1902, on her behalf to have the following (amongst other) questions decided:—

1. Does the plaintiff Charlotte Sullivan take the property given to her by the will of the testator of August 2nd, 1897, upon and subject to the trusts, provisions, and declarations contained in the letter of July 31st, 1897?

2. If the first question be answered in the negative, does the plaintiff Charlotte Sullivan take the property bequeathed to her

by the said will for her own absolute benefit, unimpressed with any trusts, or what estate does she take therein, or does she take the property upon any, and if so, upon what trusts? Robert Sullivan and Mrs. Vanston were made defendants. The summons was entitled in the matter of the trusts of the will of Marcus Clement Sullivan, and of a letter of trust dated July 31st, 1897, signed by the said testator, and in the matter of the Trustee Acts, and the hearing was adjourned into Court. Questions were also asked as to whether the direction in the letter as to the house No. 26, Highfield-road, described in the letter as follows:—"Clemmie to have this house (26)" took effect, having regard to the covenants contained in her marriage settlement to pay the sum of £2000 and £1000, and also whether Mrs. Vanston and Edward Sullivan took any benefit under the said letter of trust, being the witnesses to the testator's will. As, however, the letter was held not to be binding on Mrs. Sullivan, it became unnecessary to answer these further questions.

Ignatius J. O'Brien, *K.C.*, and *Littledale*, for the plaintiff Mrs. Sullivan.

Law, *K.C.*, for the defendant Mrs. Vanston:—

The will creates no precatory trust: *Clancarty* v. *Clancarty* (1), where the words were substantially the same as here. The question is, is the letter binding on Mrs. Sullivan. She would be bound by it, if the terms of it created a binding trust, as it was communicated to her, and she acquiesced in it, but the clause, "I think this disposition is fair as I can make it, and I hope it will satisfy all, but you, of course, may modify it, if you think or find it desirable," governs the whole letter, and shows that the directions in it were not to be binding on her. The testator intended that his wife should act entirely as she thought fit as his *alter ego*, as said by Lord Hatherley in *M'Cormick* v. *Grogan* (2), which is very like this case. There the words of the letter, which were held not to create a trust binding on the executor, were:—"I do not wish you to act strictly on the foregoing

(1) 31 L. R. Ir. 530. (2) L. R. 4 H. L. 96.

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instructions, but I leave it entirely to your own good judgment to do as you think I would if living, and as the parties are deserving." There is nothing in the letter here to create a precatory trust, nor a trust by way of fraud. [He also referred to *Trench* v. *Hamilton* (1); *Williams* v. *Williams* (2); *Morrison* v. *M'Ferran* (3); *Hetley* v. *Hetley* (4).]

Matheson, K.C., for the defendant Robert Sullivan:—

His interest is to contend that the letter is a binding document, as he gets benefits under it. I do not say that it creates an express trust, but I say that Mrs. Sullivan is bound by the letter and bound to carry it out, and that it would be a fraud on her part not to carry it out. She took the property in the will, knowing that the testator intended that she should carry out the directions in the letter. He says, "You will give Robert £500." The subsequent words "of course you may modify it if you think or find it desirable" would give her power to make some alterations, but could not have been intended to revoke the legacy of £500 to Robert, and the legacies of like amount to his brothers. *M'Cormick* v. *Grogan* (5) is distinguishable. There the object of the testator was secrecy; here the testator told his wife and family his wishes, and read out the letter to them. If the letter is not binding on her, she could, if she married again, settle the property on her second husband; but would not that be a fraud? It would be worse than what was done in *French* v. *French* (6).

Day, for Edward Sullivan:—

His interest is the same as that of Robert Sullivan. The gift to him under the letter is not void because he witnessed the will. The document under which Edward Sullivan claims a benefit is not within section 15 of the Wills Act, as it is not a will. *Sidgreaves* v. *Brewer* (7) is not a satisfactory authority; it is only a *dictum* at best, and there is only one reference in the argument to the point.

(1) [1895] 2 Ch. 370.
(2) [1897] 2 Ch. 12.
(3) [1901] 1 I. R. 366.
(4) [1902] 2 Ch. 866.
(5) L. R. 4 H. L. 96.
(6) [1902] 1 I. R. 172.
(7) 15 Ch. D. 594.

THE MASTER OF THE ROLLS :—

No question arises on the face of the will itself. [The Master of the Rolls read the will.] It is signed by the testator and witnessed by two of his children, Edward Stewart Sullivan and Clementina Mary Sullivan (now Mrs. Vanston). On the face of it, while it expresses unbounded confidence in his wife, it does not in my opinion impose any binding trust upon her. It has not been argued that it did, whether she knew his wishes or not. He relied not on the sanction of the law or of any obligation fastened upon her conscience, but upon his confidence that she would take his advice and so carry out his wishes. The law on this subject has greatly changed of late years, and the tendency of the Court when dealing with a disposition of property by will, especially in the case of a disposition by a husband in favour of a wife, is to lean against precatory trusts. The will is followed by a letter the exact date of which is not clear. The trust, if any, is secret in no other sense than that it was not disclosed in the will. Indeed, it could not in the circumstances of the case be properly said to have been been secret at all, but the legal effect to be given to it is the same. The testator was about to take a journey abroad when he made his will and drew up this document, both of which he read over to his wife in presence of all his family as appears from her affidavit. It is not clear whether the will was executed before or after this communication took place. It does not make much difference. This was in the month of August, 1897, and the testator did not die for some years after. There was ample time before his death for him to make a new will, or to alter the will by a codicil, or to alter the document, if she had not assented to it. It was communicated to her, and I have no doubt that she gave her husband to understand by her demeanour that she accepted the terms of it. There was no secrecy. Whatever may have been his reason for disposing of his property in this way, he had no intention of doing anything forbidden by or contrary to law. That is not conclusive; for in other cases, *e.g.* in *French* v. *French* (1), there was no special reason of that sort for secrecy. His family heard it read; there is no suggestion of concealment.

(1) [1902] 1 I. R. 172.

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I think that the circumstances in which the document was read were such as to make it evidence of a binding trust if it were intrinsically capable of creating a trust. Of course it would be a fraud if a person obtained a legacy on the undertaking or understanding that it was to be held for somebody else and then closed upon it himself. Then, what is the document? There is no reason why he should not have executed it as a will if he meant it to have binding efficacy. It is dated 31st July, 1897, three days before the date of the will. The first part consists of directions in the nature of advice as to whom his wife should consult. Then he goes on:—"Now the reason I make my will in this way is, you will not have to sell out the investments unless you are advised as an act of prudence to do so, and any of them you sell you will have the power of reinvesting in other than Government securities. There are many safe debentures and preference shares which return at least four per cent. interest." This clause is not unimportant. It is clear that one at least of the reasons why he gave everything to her was that she might invest in securities other than trust securities. Suppose he thought that he was making his wife a trustee, with the obligations and responsibility of a trustee, he must have known that this document would give the members of his family notice that she was a trustee, so that his object would be frustrated. He then refers to his brother Dan's estate, to which he was entitled subject to the life estate of Mrs. E. C. Sullivan. Then he goes on:—"As to my wishes for the disposal of our property, you will have to get your will made . . . I wish the following arrangement to be made in the meantime, that is on my death." Then follow directions to give the sum of £500 each to his sons in language which would be quite sufficient in a will to give them legacies. They are introduced with the words "my wishes." Then he says what he wishes to be done with the remainder of his assets and with the reversion of Dan's assets, and how the net proceeds are to be divided. There are erasures and alterations in the clause following, which I must, however, read as not modified, as the alterations were made after the will, and there is no evidence that they were communicated to the wife. Then comes the important clause.

Up to this there is nothing in the document which would pre-

vent its being executed as a will, and it could have been made one by a proper attestation. The words are, "I think this disposition is as fair as I can make it, and I hope it will satisfy all." I can fancy him looking at his wife and children as he read it to see how they took it. He then adds, "But you, of course, may modify it if you think or find it desirable." Why "of course"? "Of course" she could not modify it if it imposed a binding trust, and if not, "of course" she could. What he had in his mind was, "the will leaves everything to you," and therefore he added, "but you may change it if you find it desirable." Mr. Matheson suggested that this power to modify might be limited to part of the document, *e.g.* to the particular house or houses he wished each daughter to get, but I think it must apply to the whole. What is the meaning of it? It must mean that she was not to be bound by the terms of the document, which is in the nature of a recommendation to her founded on his idea of fairness, with full power to her to modify or alter. Take it that she accepted the document. She did so as a whole. She knew this clause was in it. The circumstance that the document was not mentioned in the will, and that it was not itself a will, must have been present to her mind, though, no doubt, she would feel herself under an honourable obligation, as matter of good feeling to have regard to his wishes, bearing in mind that his wishes included the desire that nothing in the document was to be binding on her as matter of law. She would feel it her duty to carry out the expressed directions subject to this, that nothing in the writing imposed a binding trust on her.

M'Cormick v. *Grogan* (1) is important, if not conclusive, on this point. There there were two questions argued: first, was the letter which was with the will communicated to the defendant Grogan; and, second, if it was, did it impose a binding trust on him to carry out its terms? The language of the letter there was perhaps stronger in favour of the view that the testator intended Grogan to act as his trustee or *alter ego*. It was argued on behalf of M'Cormick that the use of the word "strictly" ("I do not wish you to act *strictly* to the foregoing instructions—No fault can be found if you do not act in *strict* accordance with it,") showed

(1) L. R. 4 H. L. 82.

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that some amount of obligation was to be imposed by the letter, and that the power to deviate must be understood as extending only to slight or immaterial variations. Compare the words in the document here, "you of course may modify it." Lord Hatherley refers to the passage in the letter which I have indicated. He says, at p. 96 of the report, "What can that mean but this: 'I do not mean to fetter you by these instructions. I desire you not to produce them. I wish to give nobody any control or power over you. I wish to leave you entirely to your own discretion as to whether you think the parties to be or not to be deserving.'" Though the language of the letter here is different the sense is the same and the same principle applies. There is no legal obligation imposed by it on this lady to act in accordance with it. She may modify it as she pleases. Such a power to modify as we find here cannot be construed as imposing a trust. In my opinion therefore this letter does not impose any binding trust enforceable against Mrs. Sullivan.

It is not necessary to answer the other questions in the summons; but as regards the point which has been discussed whether Mrs. Vanston and Edward Sullivan have lost any benefit they would have taken under the terms of the letter by reason of their having witnessed the will, I may say that it may be a serious question when it arises whether the provision of the Statute of Wills has any application in cases where the will does not give any legacy to a person who has witnessed it, by reason merely of the witness taking something in the nature of a legacy under the operation of a trust not disclosed in the will, but imposed upon the conscience of a legatee. It is not necessary to express any opinion on this question.

Solicitors for the plaintiff: *Hoey & Denning.*

Solicitor for the defendant Clementina Vanston: *J. S. Vanston.*

Solicitors for the defendant Robert Sullivan and for Edward Sullivan: *Hamilton & Craig.*

W. L.

HARRIS *v.* LOFTUS (No. 2).

(1903. No. 14.)

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Feb. 25. March 30.

Will—Construction—Direction to settle—To be settled on each marriage strictly on my said daughters, and on their demise on their lawful issue, share and share alike—Executory trust—Children of marriage attaining twenty-one, or daughters marrying, only to take.

A testator bequeathed to each of his four unmarried daughters a sum of Stock, to be settled on each marriage strictly on his said daughters, and on their demise on their lawful issue, share and share alike, not to be subject to the control of any husband his daughters might marry; and in case of any of his said daughters dying and leaving no lawful issue to attain twenty-one or get married, then such Stock to be divided, share and share alike, between the survivors of his said four daughters. By a settlement made on the marriage of a daughter it was declared that the trustees of the will should hold the daughter's Stock upon trust for her for life, and after her decease for all and every her child and children, if more than one, share and share alike. There were four children of the marriage, one of whom died in the lifetime of the father and mother under age and unmarried. The other three attained twenty-one and survived their father, but one of them died in the lifetime of their mother:—

Held, that the trust was executory, and that the settlement should have been for the mother for life, and then for sons attaining twenty-one and daughters attaining that age or marrying, and that the fund was divisible in thirds amongst the children who attained age.

ADJOURNED SUMMONS.

Robert Fannin made his will, dated the 14th December, 1841, and thereby bequeathed to trustees £80,000 old 3½ per cent. Government Stock, and £40,000 New 3½ per cent. Government Stock, in trust and as trustees for the uses, purposes, and intents thereafter named, and for no other use, purpose, or intent whatsoever, that was to say, and the testator continued—"I leave to and bequeath unto each of my four unmarried daughters, viz. Martha, Maryann, Margaret, and Catherine Fannin, the sum of £10,000 new 3½ per cent. Government Stock, to be paid and assigned to each as a marriage portion on their respective

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marriages, and £20,000 Old 3½ per cent. Government Stock, to be settled on each marriage strictly on my said daughters, and on their demise on their lawful issue, share and share alike, not to be subject in any manner to the control or management of any husband my said daughters may at any time marry; and in case of any of my said four daughters dying and leaving no lawful issue to attain the age of twenty-one years or get married, then such share or shares of £20,000 old 3½ per cent. to be divided, share and share alike, between the survivors of my said four daughters."

The testator died in January, 1843, and his will was proved.

One of the daughters, Margaret Fannin, married the Rev. Lord Adam Loftus, and by her marriage settlement, dated the 10th June, 1846, and to which the trustees of the will were parties, and which, amongst other matters, recited the bequest of her £20,000 Stock, and an agreement that a sum of 3¼ per cent. Stock then representing the same should remain invested in the names of the trustees of the will upon the trusts thereinafter, in conformity with and in execution of the directions of the testator, expressed and declared concerning the same, it was declared that the said trustees should hold the said sum of Stock upon trust during the joint lives of Lord Adam Loftus and Margaret Fannin, to pay the interest and dividends thereof to Margaret Fannin for her separate use, and after the decease of Lord Adam Loftus, in case Margaret Fannin should survive him, to permit her and her assigns to receive such interest and dividends during her life for her sole use and benefit, and not to be subject to the control or management of any husband she might thereafter marry, and after the decease of Margaret Fannin, in case such decease should happen in the lifetime of Lord Adam Loftus, then, as to the principal sum of Stock and the interest and dividends thenceforth, in trust for all and every the child and children of Lord Adam Loftus and Margaret Fannin equally between them, if more than one, share and share alike, and, if but one, the whole to such child; but in case Margaret Fannin should survive Lord Adam Loftus, then, after her decease, as to the said principal sum and the interest and dividends thenceforth to arise therefrom, in trust for all and every the child and children of Margaret Fannin by Lord Adam Loftus and any other husband or husbands, equally between

them, if more than one, share and share alike; and if there should not be any child or children of Margaret Fannin by any husband, or there being such, he, she, or they should die under the age of twenty-one years and without having been married, then in trust for all and every the person or persons who, upon such contingency happening, should under the said will be entitled to the same.

There were four children of the marriage, one of whom, Adam Robert Charles Loftus, died in his father's lifetime, under age and unmarried.

Lord Adam Loftus died in 1866, leaving him surviving his widow and his three other children, namely, John Henry, afterwards Marquis of Ely, George Herbert, afterwards Lord George Loftus, and Marian Loftus. By his will he left all his property to his wife for life, and after her death to be divided equally amongst all his children then alive.

Marian Loftus married Robert O'Brien Studdert, and died in the lifetime of her mother.

The Marquis of Ely mortgaged his interest in the trust funds to A. W. Harris.

See a report of the case on questions then arising: *Harris* v. *Loftus*, [1899] 1 I. R. 491.

Lady Adam Loftus died on the 3rd May, 1902.

This was a summons taken out in the Matter of the trusts of the will and settlement, by A. W. Harris as plaintiff against the other persons interested as defendants for the determination of the questions—whether the said sum of £20,000 Stock and the investments representing the same became on the death of Lady Adam Loftus divisible into three or four equal shares, and whether the share, if any, of Adam Robert Charles Loftus became vested in his father Lord Adam Loftus.

C. A. O'Connor, K.C., for the plaintiff:—

The plaintiff is not interested in this question, because his security is sufficient whether it consists of one-third or one-fourth of the fund in question. There is, however, a marked distinction between the gifts of the £10,000 and £20,000 to each daughter—the first is to be paid and assigned to her on her marriage, the

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second is directed to be settled on the marriage strictly. The testator was not his own conveyancer, but his will contains an indication that only issue attaining twenty-one, or marrying, should take—the final gift over being in default of issue to fulfil one of those conditions. The settlement adopts the language of the will, and accordingly we are thrown back on it.

T. Pakenham Law, K.C., for Lord George Loftus in his personal capacity :—

The fund is divisible in moieties between Lord George Loftus and the Marquis of Ely—the only children who survived their mother. This was practically decided on the previous summons. The arguments were directed to this point, and in the judgment of the Court ([1899] 1 I. R. 498) it is laid down that the direction to settle amounts only to the preparing a formal settlement carrying out the trusts of the will, and does not authorize any departure from or variation of the rights of the parties intended to be provided for from those indicated by the will. The will gives the fund to the persons named, "in trust and as trustees for the uses, purposes, and intents hereafter named, and for no other use, purpose, or intent whatsoever, that is to say . . ." meaning that the words the testator uses are to regulate the devolution of the property. The words "on their respective marriages" clearly point to time, so does the direction to be settled "on" each marriage strictly; and similarly the words "and on their demise" do not indicate a limitation over, but a period of time when the class of issue to take is to be ascertained, and a person dying before it is not included. This harmonises, as no other construction does, with the final gift over in case of a daughter "leaving" no issue. It cannot be contended that the sums of £10,000 would vest at any time but marriage: see *Hotchkin* v. *Humfrey* (1), and *Bree* v. *Perfect* (2), referred to by Kay, J., in *In re Bevan's Trusts* (3).

Samuels, K.C. (with him *C. W. R. Brady*), for the Marquis of Ely :—

The fund is divisible in halves. See the judgment in the former

(1) 2 Mad. 65. (2) 1 Coll. 128. (3) 34 Ch. D. 716.

argument ([1899] 1 I. R. 498). "The direction to settle . . . amounts only to the preparing a formal settlement carrying out the trusts of the will." "Leaving" no lawful issue means not having issue surviving at the daughter's death; that is the natural and *prima facie* meaning of the word: see Theobald, Law of Wills (5th ed.), 617; and there is nothing here to control it: *Bythesea* v. *Bythesea* (1), a stronger case than the present, as there the share was directed to be a vested interest: *Sheffield* v. *Kennett* (2); *In re Watson's Trusts* (3).

If, in order to take, it was not necessary that the children of the marriage should survive their mother, then they took immediate vested interests, and the fund is divisible in fourths: *Kimberley* v. *Tew* (4); *Skey* v. *Barnes* (5).

Garrett W. Walker, for the personal representative of Marian Studdert and the trustees of her marriage settlement:—

We are here to argue the question in the summons, whether the fund is divisible into three or four parts—a division into moieties is not suggested. The child who died under age had not a vested interest. The cases cited for the contrary view have no bearing on the case; they all turned on the construction of particular wills. The previous decision in this case was confined to the one point—the construction to be placed on the word "issue," but so far as it bears on the question of settlement, its effect is that the trust is executory. The fund is "to be settled" "on each marriage," that is by a marriage settlement, and "strictly." These provisions stereotype the bequest as an executory trust: see *Duckett* v. *Thompson* (6). Reliance is placed on the word "leaving" in the gift over, but see *Treharne* v. *Layton* (7). The cases cited were cases of contingent interests which form an exception to the general rule. The principle is stated in Theobald (5th ed.), p. 617.

As to the proper form of settlement to carry out the direction in the will, see *Cogan* v. *Duffield* (8), where a settlement had been executed, but the Court rectified it by excluding a child dying

(1) 23 L. J. (N. S.) Ch. 1004.
(2) 27 Beav. 207; 4 DeG. & J. 593.
(3) L. R. 10 Eq. 36.
(4) 4 Dr. & War. 139.
(5) 3 Mer. 335.
(6) 11 L. R. Ir. 424.
(7) L. R. 10 Q. B. 459.
(8) 2 Ch. D. 44.

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under age: *Gowan* v. *Gowan* (1); *Spirett* v. *Willows* (2); *Walter* v. *Parrott* (3).

Day, for the trustees of the settlement of 1846.

Poole, for Lord George Loftus, as personal representative of Adam Robert Charles Loftus:—

Mr. Walker's argument is directed to getting over the previous decision of this Court, that the trust was executed not executory. See his argument on that occasion for the Studdert children ([1899] 1 I. R. 495). The will gives a clear vested interest to the testator's grandchildren: *M'Lachlan* v. *Taitt* (4). The law favours vesting where there is a gift to a class. The subsequent words do not import the contingency so as to prevent vesting: see 2 Wms. Exors. (9th ed.), 1110, where the general rule is stated, and *Skey* v. *Barnes* (5), and *Davies* v. *Fisher* (6) are cited. If the words of the gift over are read into the original bequest, it will be a gift to each daughter and then to her issue, with a gift over in case all such issue should die under twenty-one, an event which has not happened, so that there is no divesting.

Lawson, for the trustees of the marriage settlement of Lord George Loftus, supported the argument that the fund was divisible in thirds. He referred to *Walter* v. *Parrott* (3); *Cogan* v. *Duffield* (7); *Gowan* v. *Gowan* (1); *Hotchkin* v. *Humfrey* (8); *Mostyn* v. *Mostyn* (9).

Henry G. Richards, for the trustees of the will of Robert Fannin.

C. W. R. Brady, in reply, for the Marquis of Ely:—

It has been already decided that the trust is executed—the will is itself the settlement—and here the word "leaving" cannot be read "having had." In *Treharne* v. *Layton* (10) the immediate

(1) 17 Ch. D. 778.
(2) L. R. 4 Ch. 407.
(3) 33 Ch. D. 274.
(4) 3 D. F. & J. 449.
(5) 3 Mer. 335, 340.
(6) 5 Beav. 201, 214.
(7) 2 Ch. D. 44.
(8) 2 Mad. 65.
(9) 1 Coll. 161, 165.
(10) L. R. 10 Q. B. 459.

prior gift would have been destroyed unless the word were so construed. Here a contingency only is created. The fund goes to the two sons who survived their mother.

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HARRIS *v.* LOFTUS.

THE VICE-CHANCELLOR:—

March 30.

By the will of Robert Fannin, dated the 14th December, 1841, he left to each of his four daughters £10,000 to be assigned to each as a marriage portion on their respective marriages, and £20,000 Government Stock to be settled on each marriage strictly on his said daughters, and on their demise on their lawful issue, share and share alike, not to be subject in any manner to the control or management of any husband his said daughters might at any time marry, and in case of any of his said four daughters dying and leaving no lawful issue to attain the age of twenty-one years, or get married, then such share or shares of the £20,000 Stock to be divided, share and share alike, between the survivors of his said four daughters. The question with which I have now to deal arises as to the £20,000 to which Margaret, one of the daughters of the testator, became entitled on her marriage with Lord Adam Loftus. There were four children of that marriage, two sons, who attained twenty-one; a daughter Marian, who attained twenty-one, and married Mr. Studdert; and Lord Adam Charles Loftus, who died an infant and unmarried in his father's lifetime. The controversy is as to what became of his share; whether his personal representative took it absolutely though he did not marry nor live till he attained twenty-one, or whether it went in equal third parts between the survivors of the children; or whether it became divisible in equal moieties between the two surviving sons.

The first question is, whether Lord Adam Charles Loftus took his one-fourth absolutely. The £20,000 of Margaret, with which alone I have now to deal, was directed to be settled on her marriage strictly on her, and on her demise on her lawful issue, share and share alike, not to be subject to the control or management of her husband. This would, in my opinion, require a settlement to be made on her for her sole and separate use for her life, and on her death on her *children* (as held by me in *Harris* v.

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Loftus (1)) in equal shares. All this is, in my opinion, governed by the direction that the share should be settled strictly. This direction is not confined to a settlement on the testator's daughter, but extends to her issue, share and share alike. What, then, should be the form of such a settlement? It should be a settlement on the mother for her life for her separate use, and without power of anticipation, with a trust in case she should die leaving issue, for such issue in equal shares on their respectively, if sons, attaining twenty-one, and if daughters, attaining twenty-one or being married, with a gift over in case there should be no child of the mother who should attain the prescribed age. I cannot hold that this trust was executed, and not executory. This view, in the events that have happened, excludes the claim of the personal representative of Lord Adam Charles Loftus to any share of the fund.

It comes then to be a question whether the fund is divisible in thirds or in moieties. I do not find any sufficient ground for excluding the claim of the representatives of Mrs. Studdert from participation in the fund. She attained twenty-one, and was married, and I hold that her representatives are entitled to a share of the fund, and that the same is, therefore, divisible in thirds.

Solicitor for the plaintiff: *Harris.*

Solicitors for the defendants: *Weldon C. Molony*; *Alexander Irvine & Co.*; *M'Mahon & Tweedy*; *Hamilton & Craig.*

D. M'C. M.

(1) [1899] 1 I. R. 491.

WARD *v.* WARD.

(1901. No. 981.)

V.-C. 1903.
Jan. 21.
March 5.

Will—Construction—Annuities, whether for life or perpetual.

A testator devised all his property to his two sons William and Thomas Ward equally. Portion of his property which he specified he charged item by item with certain annuities. He also gave to his said two sons all other unmentioned property of his. The will contained the following direction:—"My two sons Thomas and William are to pay out my property as follows: to pay to my wife yearly during her life £18 4*s.*; to my daughter Mrs. O'Neill yearly £36 8*s.*; to my son Tim Ward yearly £18 4*s.*; to said William Ward's eldest son yearly £3 12*s.*" The testator then directed that after the death of his wife her annuity was to be equally divided between Thomas and William and Tim Ward and Mrs. O'Neill, and that after the decease of Mrs. O'Neill her annuity was to be divided equally between her surviving children. Should Tim Ward not come home or die without issue, his annuity was to be divided equally "on the surviving families, viz. Mrs. O'Neill, Thomas, William, and mother":—

Held, that the annuities were for the lives of the annuitants only, and not perpetual.

By his will, dated 29th June, 1855, Thomas Ward, of Bagnalstown, in the county of Carlow, devised all his property, portion of which he specified and charged item by item with certain yearly sums, amounting to £110, to his sons Thomas Ward and William Ward equally, and he bequeathed the remainder of his property to them in the following words:—"Together with the late Mather's Goresbridge stores and Kilree-street houses, with all other unmentioned property of mine." The will contained the following directions, viz.:—"My two sons Thomas and William are to pay out my property as follows: 1st, after a decent interment to pay all my fair debts; 2ndly, to buy most desirable raiment for the poor £10; 3rdly, to pay to my wife yearly during her life £18 4*s.*; 4thly, to my daughter Mrs. O'Neill yearly £36 8*s.* 5*d.*; 5thly, to my son Tim Ward £18 4*s.*; 6thly, to said William Ward's eldest son yearly £3 12*s.*; 7thly, to my niece Mary Jane Ward £100 to

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be paid on her arriving to age; 8thly, to my maid Bridget Murphy £10; after the decease of my wife her annuity to be equally divided between Thomas, William, and Tim Ward, and Mrs. O'Neill; after the decease of Mrs. O'Neill her annuity to be divided equally between her surviving children; should Tim Ward not come home or die without issue his annuity to be divided equally on the surviving 'families': Mrs. O'Neill, Thomas, William, and mother."

Thomas Ward, senior, died on 13th July, 1855, and his wife Mary Ward died on 10th July, 1863. His son Tim Ward was in America at the time of his death, and never returned home, and died in America unmarried over twenty years prior to the date of these proceedings. The testator's grandson Thomas Ward (the third) commuted the annuity given to him under the will for a bulk sum. The testator's son Thomas Ward died a bachelor in Bagnalstown on the 27th October, 1884.

By his will, dated 8th May, 1884, the said Thomas Ward (the second) devised all his property to his brother William, whom he appointed his executor.

By an indenture dated 8th November, 1901, William Ward conveyed a portion of the property to which he was entitled under the will of the testator, Thomas Ward, senior, to his son Samuel Ward (the plaintiff).

The present summons was taken out by Samuel Ward to have the question determined, whether the annuities given by the will were for the lives of the annuitants only or perpetual.

Molony, K.C., and *James O'Connor*, for the plaintiff:—

The gift of annuity to a person for life, coupled with a gift over of the annuity to another person or persons, gives the beneficiaries a life interest only: Theobald on Wills, pages 446, 447; *Lett* v. *Randall* (1). The latter case deals with an annuity given to a wife and child, similar to the gift to Mrs. O'Neill and her children in the present instance. In the case of Timothy Ward's annuity it is clear that he only took for life in the events which have happened.

(1) 2 D. F. & J. 388.

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Matheson, K.C., and *Corvan*, for Bridget O'Neill and her children :—

The property dealt with is chattel real, and therefore only a slight indication of intention is necessary to show that the annuities were intended to be perpetual. The expression used is "shall pay out my property," not "shall pay out of my property," and that amounts to a setting apart a portion of the *corpus* of the property to meet the annuities, and not a direction that they should be paid merely out of income. The testator clearly contemplated the continuance of the annuities beyond the life of the first taker respectively, and treated the annuities as existing annuities by referring to them as "his" or "her" annuities. The case falls within the principles laid down in *Kerr* v. *Middlesex Hospital* (1) ; *Stokes* v. *Heron* (2) ; *Mansergh* v. *Campbell* (3) ; *Bent* v. *Callen* (4). [They also referred to *Jackson* v. *Winder* (5).]

James O'Connor, in reply :—

The testator first left the property which he charged with the annuities to his two sons, and he then made them residuary legatees of all his other property not so charged. This shows that he contemplated their deriving some benefit from the portion of the property so charged, but if the annuities are perpetual they would get nothing, as practically the whole of this part of the property would be exhausted. The cases cited on the other side were all cases where the testator set apart sufficient capital to produce an annuity, but that was not done here.

March 5.

THE VICE-CHANCELLOR :—

The question which is raised for my decision is whether certain annuities left by the will of Thomas Ward are perpetual or for life only. He bequeathed all his chattels and property to his two sons Thomas Ward and William Ward equally. He specifies the property, and charges it item by item with certain yearly sums therein stated, amounting in all to a profit of £110 yearly, "together with all other unmentioned property" of his. He then

(1) 2 D. M'N. & G. 576.
(2) 12 Cl. & F. 161.
(3) 3 D. & J. 232.
(4) L. R. 6 Ch. App. 235.
(5) New Ir. Jur. vol. 1, p. 234.

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proceeds, "My two sons Thomas and William are to *pay out* my property as follows: to pay to my wife yearly during her life £18 4*s.*; to my daughter Mrs. O'Neill yearly £36 8*s.*; to my son Tim Ward yearly £18 4*s.*; and to said William Ward's eldest son yearly £3 12*s.*" He then leaves £100 to his niece Mary Jane Ward to be paid her on her arriving *to* age; and to Bridget Murphy £10. He then directed that after the death of his wife *her* annuity was to be equally divided between Thomas, William, and Tim Ward, and Mrs. O'Neill, and that after the decease of Mrs. O'Neill *her* annuity was to be divided equally between her surviving children. He also directed that should Tim Ward not come home or die without issue *his* annuity was to be divided equally "*on* the surviving families, viz. Mrs. O'Neill, Thomas, William, and mother." I do not think it very material to decide whether the words "to pay out my property" are to be construed as "to pay out *of*," which was probably what the testator meant, or to construe it as it stands. The testator couples it with all his other property, though not specially mentioned, by the words "together with all other unmentioned property of mine," thus making all one general fund without segregation or distinction. There was nothing of setting apart a portion of his assets for the payment of the annuities, nor did he direct them to be purchased out of his general assets. He simply gives the annuities to the persons named for their respective lives, and after their respective deaths he directs them to be divided between the persons named respectively. In my opinion this is not sufficient to make them perpetual. The main ground for contending that they were made perpetual is that the testator calls them *his* or *her* annuity after the death of the first taker. This was relied on as proving that he contemplated the same annuity as being still in existence after the death of the first taker, and that therefore it must be a perpetual annuity, and not merely for the life of such first taker. I cannot hold this to be enough to take the case out of what appears to be now an established rule on this subject. I must declare that these respective annuities are for life only, and are not perpetual.

Solicitor for the plaintiff: *Duggan.*
Solicitor for the defendants: *Byrne.*

J. MAC M.

IN THE MATTER OF THE ESTATE OF BARON KEANE, OWNER AND PETITIONER; CONTINUED IN THE NAME OF HENRY JOHN WILLIAM FARRELL, AS OWNER; AND FURTHER CONTINUED IN THE NAME OF HENRY JOHN WILLIAM FARRELL PALLISER, AS OWNER.

Ross, J.
1903.
Feb. 23, 24.
March 3.

Will—Construction—Estate tail—Rule in Shelley's Case.

A devised fee-simple lands in trust for B and his assigns for the term of his natural life, and after his decease to the use of B's second son C and his assigns for the term of his natural life and his issue male in succession, so that every such son might take an estate for life, with remainder to his first and every subsequent son successively, according to seniority, in tail male. The will contained a proviso that C and his issue should take the name of P. when he or they became entitled, and in case of refusal the estate or estates limited for the life of such person so refusing should cease, and the subsequent limitations be accelerated. B died in 1882. C died in 1889, leaving two sons, D and E, who were both living at the death of A. D executed a disentailing deed:—

Held, applying the rule in *Shelley's Case* (1 Rep. 93 *b*), that C took an estate tail.

MOTION on behalf of the owner for an order declaring that upon the true construction of the will of Mary Jane Keane, deceased, the said Henry John William Farrell Palliser became entitled, as tenant in tail male, to the surplus proceeds of the sale of that part of the estate in this matter which had been sold, and that by virtue of his disentailing deed, dated the 5th of November, 1902, and in the events which had happened he was absolutely entitled to the surplus funds.

Mary Jane Keane, wife of John Manly Arbuthnot Keane, commonly called the Hon. John Manly Arbuthnot Keane, was at the time of her will, and of her death, seized in fee-simple in possession, for her sole and separate use, of certain hereditaments in the Co. Wexford called the Castletown, Portobello, and Drillington estates. She made her will, dated the 28th December, 1868, the material features of which are as follows:—"I give,

Ross, J. 1903. *In re* KEANE'S ESTATE.

devise, and bequeath all my estates of Castletown, Portobello, and Drillington, and all other estates in fee-simple, freehold, or leasehold, unto Major Farrell, late of the Royal Artillery, and Robert Cornwall, of Rutland-square, Dublin, and the survivor of them, and the heirs, executors, and administrators of such survivor, upon trust for the use of my dear husband and his assigns during his natural life without impeachment of waste; and in case he should marry again and have issue of such marriage, then, from and after his decease, for the use of his first and every other son and his issue male in succession, so that every elder son and his issue male may take an estate for his life, with remainder to his first and every subsequent son successively according to seniority in tail male; and on failure of such issue, then upon trust for my dear and early friend, the said Major Farrell, late of the Royal Artillery, and his assigns, for the term of his natural life; and from and after his decease or in case of his decease during the lifetime of my said husband or before the failure of the limitations aforesaid, then upon such failure to the use of his second son Henry Farrell, also of the Royal Artillery, and his assigns, for the term of his natural life, and his issue male in succession, so that every such son may take an estate for life, with remainder to his first and every subsequent son successively according to seniority in tail male . . . Provided always that the said Henry Farrell and his issue male, when he shall become entitled as beneficial tenant for life or in tail in possession under the limitations herein contained, shall as to every such tenant for life or in tail obtain a license from the Crown to assume and use the surname of Palliser either alone or in addition to his own name, so that the name of Palliser shall be the last and principal name, and thenceforth use the said surname; and in case of neglect or refusal to comply with the terms of this proviso, the estate or estates hereby limited for the life of such person so refusing or neglecting shall cease, and the subsequent limitations be accelerated."

The testatrix died on the 24th of October, 1881, without having revoked or altered her will, leaving her husband surviving. He succeeded to the title of Baron Keane in the year 1882, and afterwards intermarried with Francina Morrell; there was no issue of the marriage.

Major John Sidney Farrell (in the will called Major Farrell) died on the 18th of December, 1882, in the lifetime of Baron Keane. His second son Henry Farrell died on the 2nd of July, 1889, also in the lifetime of Baron Keane, leaving two sons surviving, viz. Henry John William Farrell, now Henry John William Farrell Palliser, the owner in the title hereof, born on the 25th December, 1867, and Sidney Arthur Chamberlayne Farrell, born on the 25th of March, 1872. Henry Farrell executed no disentailing deed. The petition herein was filed in the year 1889 by Baron Keane. He died on the 27th of November, 1901, whereupon the owner succeeded under the terms of the will. He obtained a Royal License on the 20th of October, 1902, to assume the name of Palliser in addition to that of Farrell, in accordance with the proviso in the will. He executed a disentailing deed on the 5th of November, 1902, and married on the 8th of December, 1902. All the charges and incumbrances affecting the estate had been discharged out of the proceeds of the sale of the lands, save certain in respect of which sums were retained, and a considerable surplus was in Court. Sidney Lyon Geaves and George Henry Bowles were appointed trustees of the will, by deed, on the 12th of December, 1902.

Matheson, K.C. (with him *Poole*), for Major Farrell Palliser, the owner:—

The rule in *Shelley's Case* (1) applies, and as Major Farrell Palliser has executed a disentailing deed he is now owner in fee. Under the words in the will an estate tail was created by the words of the devise, "to the use of his second son Henry Farrell . . . and his assigns for the term of his natural life, and his issue male in succession"; and all the subsequent limitations are surplusage. We rely on the *dictum* of Lord Davey in *Van Grutten* v. *Foxwell* (2), at page 684:—

> "In my opinion the rule in *Shelley's Case* is a rule of law, and not a mere rule of construction, *i.e.* one laid down for the purpose of giving effect to the testator's expressed or presumed intention. The rule is this: that whenever an estate for life is given to the ancestor or propositus, and a subsequent gift is made to take effect after his death, in

(1) 1 Rep. 93*b*.
(2) [1897] A. C. 658.

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such terms as to embrace, according to the ordinary principles of construction, the whole series of his heirs, or heirs of his body, or heirs male of his body, or whole inheritable issue taking in a course of succession, the law requires that the heirs, or heirs male of the body, or issue should take by descent, and will not permit them to take by purchase, notwithstanding any expression of intention to the contrary. Wherever, therefore, the Court comes to the conclusion that the gift over includes the whole line of heirs, general or special, the rule at once applies, and an estate of inheritance is executed in the ancestor or tenant for life, even though the testator has expressly declared that the ancestor shall take for life and no longer, or has endeavoured to graft upon the words of gift to the heirs, or heirs of the body, additions, conditions, or limitations, which are repugnant to an estate of inheritance, and such as the law cannot give effect to."

Apply this definition to the terms of the present will; the words "issue male in succession" are a legal phraseology denoting the whole line of heirs, under Lord Davey's rule, and they are the appropriate words, equivalent to the words "heirs male" in a deed. The testator attempted to cut down the estate to a life estate, but that cannot be done.

There is another view which might be presented. There is the gift to Henry Farrell for life, and then a gift to unborn children for life, and then to the issue; if the condition were to be worked out it would offend against the rule against perpetuities. It is said here that both the claimants were born within the lifetime of the testator; that is an accident, for the gift is to Henry Farrell and his issue male in succession; they are not mentioned there by name. See Theobald on Wills, 5th ed., 532, where it is laid down that a limitation to an unborn person for life, remainder to his children successively in tail, will give the unborn person an estate tail. That construction would suit me as well. It will be said that the subsequent limitations cut down the rule in *Shelley's Case* (1), but though that may have been the intention of the testatrix, the law will not allow it. The words used are technical, apt words. As to the limitations offending against the rule against perpetuities, see *Vanderplank* v. *King* (2), where Vice-Chancellor Wigram (at page 11) deals with the case where a

(1) 1 Rep. 93*b*. (2) 3 Hare, 1.

testator, after giving a particular estate to the first taker, has gone on to direct that it should go to unborn persons in a way which would create a perpetuity, with a limitation over on failure of issue of the first taker. The Court in such a case, in order to preserve and effect something which it collects from the will to have been the paramount object of the testator, rejects something else which it regards as merely a subordinate purpose, namely, the mode of carrying out that paramount intention: see also *Fetherston* v. *Fetherston* (1), where a devise to W. F. and his heirs male, according to their seniority, and on their respectively attaining twenty-one, the elder son surviving of the said W. F. and the heirs male of his body to be preferred to the second or younger son, and in case of failure of issue male of W. F. surviving him, or dying without lawful issue male attaining twenty-one, then over, was held to give an estate tail to W. F. Lord Brougham (at page 75) says:—

> "I take the principle of construction as consonant to reason, and established by authority, to be this, that where, by plain words, in themselves liable to no doubt, an estate tail is given, you are not to allow such estate to be altered and cut down to a life estate unless there are other words which plainly show the testator to have used the former as words of purchase, contrary to their natural and ordinary sense, or unless in the rest of the provisions there be some plain indication of a general intent inconsistent with an estate tail being given by the words in question, and which general intent can only be fulfilled by sacrificing the particular provisions, and regarding the expressions as words of purchase."

See also *Roddy* v. *Fitzgerald* (2). Lord Cranworth (at page 871) says:—

> "Where the testator shows upon the face of his will that he must have used technical words in another than their technical sense, there is no rule that prevents us from saying that he may be his own interpreter. . . . But unless there is something apparent upon the face of the will to the contrary, technical rules and ordinary canons of construction must prevail."

If "issue" is used in the ordinary sense, *prima facie* it is a word of limitation, and creates an estate tail.

(1) 3 Cl. & Fin. 67. (2) 6 H. L. Cas. 823.

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1903.

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Again, in the condition as to taking the name of Palliser, the testator evidently does not point to the sons, but to all the issue male in perpetuity. See also the forfeiture clause. It applies to tenants in tail as well as tenants for life. The estate tail in such a case did not come to an end, only the life estate. Even assuming Henry Farrell had an estate for life, then his son Major Palliser cannot be cut down to a life estate. He also comes in as the "issue male in succession . . . according to seniority in tail male."

Donaldson, for Sidney Lyon Geaves and George Henry Bowles, the trustees of the will of Mary Jane Keane, deceased, and for Sidney Arthur Chamberlayne Farrell, the remainderman :—

The duty of the Court is, first, to ascertain what the testatrix meant, and then to see if there is any technical rule to prevent effect being given to it. I submit that she uses "issue" as equivalent to "children." When she gives the estate to the issue of Henry Farrell in succession it is a gift to the sons, and that estate is then defined to be an estate for life with remainder over. I submit there is no rule of law to prevent the Court giving effect to what the testatrix says. The two sons were born in her lifetime, and, therefore, no question of remoteness arises. From other parts of the will it can be seen that she uses "issue" as equivalent to "children." Take the bequest to the husband and his issue by any after-taken wife. It is clear that "issue" there meant sons. In the later clauses it is absolutely clear that "issue male" meant sons, *e.g.* "to the use of her second son Henry Farrell . . . and his issue male, so that every *such* son, &c.," *e.g.* those mentioned before. Mr. Matheson must establish that Henry Farrell took an estate tail, otherwise the rule in *Shelley's Case* (1) would not apply to the subsequent limitations. Here the testatrix has translated her own language: she says "issue" means "sons." One cannot stop at the words "in succession." See the observations of Lord Herschell in *Van Grutten* v. *Foxwell* (2).—

> "If the words which are added, or indeed any provisions to be found in other parts of the will, show that the expression 'heirs,' or 'heirs of

(1) [1897] A. C. at p. 663. (2) 1 Rep. 93 *b*.

> the body,' was not intended to be used in the ordinary legal sense, but was intended to designate some individual person or particular class of persons, effect may be given to the intention of the testator thus expressed. The rule in *Shelley's Case* does not then apply, because the limitation after the estate for life is not upon the true construction of the will to the heirs or heir of the body of the tenant for life in the legal sense of those words, any more than it would have applied if the gift had been in terms to a designated person or a designated class."

In *Lowe* v. *Davies* (1) a devise to "Benjamin Jevin and his heirs lawfully begotten, that is to say to his first, second, third, and every son and sons successively lawfully to be begotten of the body of the said Benjamin, and the heirs of the body of such first, second, third, and every other son and sons successively lawfully issuing, as they shall be in seniority of age and priority of birth," was held to create only an estate for life in Benjamin.

In *Fetherston* v. *Fetherston* (2) Lord Brougham (at page 76) thus proceeds :—

> "Thus, if there is a gift first to A and the heirs of his body, and then, in continuation the testator, referring to what he had said, plainly tells us that he used the words 'heirs of the body' to denote A's first and other sons, then clearly the first taker would only take a life estate."

And at page 77 he refers to *Lowe* v. *Davies* (1). In all cases the context must be regarded, and the words "heirs of the body" are to be bound by the context. In *Jordan* v. *Adams* (3) all the Judges laid it down that technical words may be controlled by the context. The same principle is shown in *Roddy* v. *Fitzgerald* (4). See *per* Baron Watson at page 846. *Roddy* v. *Fitzgerald* (4) differs from the present case, for the main argument there was a contemplated gift over in default of issue; but all the Judges admitted there that "issue" has a flexible meaning and may yield to the context. At page 837 Baron Channell points out that the word "issue" is more flexible than the words "heirs of the body." See also the judgments of Lord Cranworth at page 871 and of Lord Wensleydale at page 876. I submit on these authorities that the testatrix did not give an estate tail, but an estate which

(1) 2 Lord Raym. 1561.
(2) 3 Cl. & Fin. 67.
(3) 9 C. B. (N. S.) 483.
(4) 6 H. L. Cas. 823.

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she explains to mean something else, and which, but for that explanation, might be held to be an estate tail. "Issue male" is more flexible than "heirs of the body"; and if the latter can be cut down the former can also. See also the observations of Jessel, M.R., in *Morgan* v. *Thomas* (1), at pages 644, 645, as to the flexibility of the word "issue." See also Jarman on Wills (1893 ed.), p. 949. In *Bradshaw* v. *Melling* (2) it was held that "issue" was the same as "children" when used in connexion with the word "parent." See also *Gummoe* v. *Howes* (3) and *Crozier* v. *Crozier* (4), which show the flexibility of the word "issue." [*Ryan* v. *Cowley* (5) was also referred to.]

Poole, in reply :—

The question is, had the testatrix in her mind the definite meaning of the words "issue male": see the judgment of Lord Davey in *Van Grutten* v. *Foxwell* (6) at page 685, as to the application of the rule in *Shelley's Case* (7). See also the observations of Lord Wensleydale in *Roddy* v. *Fitzgerald* (8) on the case of *Jesson* v. *Wight* (9). The words "issue male" appear four times in the will of Lady Keane, twice in respect of the issue male of Baron Keane, and it was therein used to include either sons or grandsons. In *In re Birks*, *Kenyon* v. *Birks* (10), Lindley, M.R., at page 418, says :—

> "It is good sense to say that whenever in a deed or will, or other document, you find that a word used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear."

In the present will the word "issue" means the male line, and there is no urgent necessity to read it as equivalent to sons.

March 3.

Ross, J. :—

This is an application on the part of Major Henry John Palliser, in whose name the proceedings are now being carried on

(1) 9 Q. B. D. 643.
(2) 19 Beav. 417.
(3) 23 Beav. 184.
(4) 3 Dr. & War. 373.
(5) Ll. & Goold, temp. Sugd. 7.
(6) [1897] A. C. 658.
(7) 1 Rep. 93*b*.
(8) 6 H. L. Cas. 823.
(9) 2 Bli. 1.
(10) [1900] 1 Ch. 417.

as owner, for an order declaring that on the true construction of the will of Mary Jane Keane, deceased, he became entitled as tenant in tail male to the surplus proceeds of the lands sold, and to the lands still remaining unsold.

The testatrix, who was the wife of the late Baron Keane, was seized in fee-simple in possession of the lands in question at the time of her death. By her will, dated the 28th of December, 1868, she devised her estates to trustees for the benefit of her husband and his sons by any after-taken wife. These trusts entirely failed, and we now come to the trusts which actually took effect. The words upon which my decision depends are these:—"Upon trust for my dear and early friend Major Farrell, late Royal Artillery, and his assigns for the term of his natural life; and from and after his decease, or in case of his decease during the lifetime of my said husband, or before the failure of the limitations aforesaid, then, upon such failure, to the use of his second son Henry Farrell, also of the Royal Artillery, and his assigns for the term of his natural life, and his issue male in succession, so that every such son may take an estate for life, with remainder to his first and every subsequent son successively, according to seniority in tail male." There follows a proviso obliging Henry Farrell and his issue male to take the name of Palliser when he or they became entitled. In case of refusal there is a proviso, "that the estate or estates limited for the life of such person so refusing shall cease, and the subsequent limitations be accelerated." The testatrix died in 1881. Major Farrell died in 1882. His second son Henry Farrell died in 1889, leaving two sons, Major Henry John Palliser, the present applicant, and a younger brother, Sidney Chamberlayne Farrell. Both these sons were in existence at the date of the testatrix's death. Baron Keane died in 1901. By a deed of the 5th of November, 1902, Henry John Palliser, claiming to be tenant in tail, disentailed. If he is tenant in tail, he is entitled to have these sums paid out of Court.

It is contended on behalf of the present trustees of the will, and on behalf of his younger brother, that, on the true construction of the will, neither Henry Farrell nor his son Major Palliser were tenants in tail; that they are merely tenants for

Ross, J. 1903. *In re* KEANE'S ESTATE.

life. This is the only question I have now to decide, the other contentions having been abandoned in the course of the argument. In the construction of difficult wills it is unprofitable to embark on speculation as to what the real intention of the testatrix was. I think it probable, from the clause as to the assumption of the name of Palliser, that the testatrix contemplated a perpetual succession of life estates in the descendants of Henry Farrell in regular order and course of descent. The duty of the Court, however, is to interpret the language of the will according to the well-settled canons of construction, and not to form conjectures about the intentions of a testator. I do not propose to examine the innumerable authorities bearing on the question I have to decide. I shall refer to certain principles that must now be taken as settled by the cases. We have, in the first place, a devise to Henry Farrell for the term of his natural life, and his issue male in succession. The result of the cases is that in a will the word "issue" is to be taken in the same sense as "heirs of the body." Either of these expressions attracts the rule in *Shelley's Case* (1). The words "heirs of the body" or "issue" are words of limitation. They do not indicate that after the death of the first taker a new class are to become objects of the testator's bounty. They limit or define the estate conferred upon the first taker. If the testatrix had stopped at the word "succession," Henry Farrell had undoubtedly an estate tail, and there would be nothing arguable in this case. But it is strongly pressed on the other side that she did not stop there. Before the ink is dry, in the same sentence, the testatrix indicates, it is said, that she means something different; she adds the explanatory clause "so that every such son may take an estate for life with remainder to his first and every subsequent son successively according to seniority in tail male." Here we must turn again to the cases, and the result is as follows:—"The first taker shall be held to take an estate tail when the devise to him is followed by a limitation to the heirs of his body, except where the intention has appeared so plainly to the contrary that no one could misunderstand it: *Poole* v. *Poole* (2). If law is to remain a science at all, precision is called

(1) 1 Rep. 93*b*. (2) 3 B. & P. 627.

for. If a testator uses technical expressions, he must be presumed to use them in their technical sense except it is demonstrable that he intended to put a different sense upon them; and it is further essential that it shall appear in what sense exactly he used the expression. It is far better for the community that a testator's real intention should be occasionally defeated than that there should be increased uncertainty in the construction of instruments.

The rule in *Shelley's Case* (1) is hardly ever applied without defeating the testator's intention: *Van Grutten* v. *Foxwell* (2). The testator may say that the first taker is to take for his life. He might add the words "and no longer." He might say that his heirs are then to take, but the rule, which is not a rule of construction merely, but a rule of law, will not permit the heirs to take by purchase, and will hold the first taker tenant in tail. The words of limitation must, however, include the whole line of heirs. If then it can be shown by the context that the words "issue" or "heirs of the body" cannot mean the whole line of heirs, and must mean something else, and something definite, the rule does not apply at all. Let us apply this principle to this will. In the first place, I think, no light can be thrown on the question by the consideration of the earlier part of the will. The language is too loose to enable one to form a precise idea of what meaning the testatrix attaches to the word "issue." We may therefore devote our attention to the immediate context. The strong point of counsel opposing the application of the rule is the expression "so that every such son" following the expression "issue male in succession." This, he says, indicates that "issue male in succession" simply means "sons in succession." I do not think that grammar obliges us to hold that the words "issue male" are in meaning identical with the words "every such son"; they might be wider in their signification. It seems to me that the clause beginning "so that" is not to be taken as an independent clause. It is added by way of explanation of what is gone before, viz.: a devise to Henry Farrell and his issue male in succession. The explanatory words are not inconsistent with the prior creation of an estate tail in Henry Farrell, but indicate

(1) 1 Rep. 93*b*. (2) [1897] A. C. 658.

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correctly the ordinary course of devolution of an estate in tail male in case no tenant in tail takes the necessary steps to convert it into an estate in fee.

I am, therefore, of opinion that there is nothing in the will to compel me to hold that the testatrix, in using these technical words, did not intend them to have their ordinary meaning, and I am, therefore, of opinion that Henry Farrell took as tenant in tail, and declare accordingly.

Solicitors for Major Palliser, having carriage: *Bowles & French.*

Solicitors for the trustees and for Sidney Farrell: *Carruthers & Gamble.*

W. C. S.

RICHARDSON *v.* MURPHY.

M. R.
1903.
Jan. 13.
Appeal.
March 12.

Trust—Charity—Charitable purpose, for the repose of souls—Selection by legatee—Masses—Uncertainty.

A testator bequeathed the residue of his estate to the Roman Catholic Archbishop of Dublin for the time being "to be applied by him in such charities as he shall select for the repose of the souls of myself, my wife, and my parents":—

Held, a valid charitable gift and not void for uncertainty.

By his will, dated 19th September, 1881, John Kinsley provided as follows:—"I will and bequeath three sums of £10 each, making in all £30 sterling, unto the Rev. Mathew M'Entee, of the Star of the Sea Chapel, Sandymount, county of Dublin, to procure the celebration of Masses—first, for the repose of my own soul; second, that of my late wife Anne Kinsley; and third, that of my father and mother. I will and bequeath to my housekeeper Mary Howe a sum of £15 sterling, and, subject to the payment of the foregoing legacies and my just debts and funeral expenses, I will and bequeath all I shall die possessed of or entitled unto to the said Rev. Mathew M'Entee aforesaid and Laurence Murphy, to hold same as trustees for the following purposes." The trusts declared were to pay the interest arising from the trust funds to the testator's daughter Frances Richardson "for the support of herself and my grandson John Kinsley Richardson, and until he shall attain the age of twenty-one years, and after that for her own support for the period of her natural life. . . . After the decease of my said daughter my trustees are to hold said trust funds as aforesaid until my said grandson shall attain the age of twenty-five years, when they are to pay him over the same." The will also provided as follows:—"In the event of my said grandson dying under the age of twenty-five years, then upon the death of my said daughter my trustees are to hold said principal sum, &c. (the trust property), and pay over or assign one-half thereof to my brother-in-law Laurence Murphy or his heirs for

M. R. 1903. RICHARDSON v. MURPHY.

his or their own proper use and benefit, and the other half thereof unto the Roman Catholic Archbishop having pastoral jurisdiction for the time being in the city of Dublin, to be applied by him in such charities as he shall select for the repose of the souls of myself, my wife, and my parents."

John Kinsley died 12th February, 1883, and probate of his will was granted on 6th March, 1884, to Laurence Murphy (the other executor having renounced). Frances Richardson, who was testator's only child, died 20th December, 1894; John Kinsley Richardson died 23rd May, 1902, aged under twenty-five years, intestate and without issue, leaving his widow Margaret Richardson surviving.

An action was commenced for the administration of the personal estate of the testator John Kinsley, and by order of the Court made on further consideration, dated 28th October, 1896, it was declared that the funds in Court to the credit of the action were subject to the trusts of the will of John Kinsley, the testator in the action, as to said testator's residuary personal estate.

Laurence Murphy died in 1898, having by his will appointed Elizabeth Murphy executrix, and probate thereof was granted to her on 7th September, 1898, and by order to proceed in the action dated 29th November, 1902, it was ordered that all further proceedings should be carried on and prosecuted in her name as personal representative of Laurence Murphy and also of John Kinsley.

An application was now made on behalf of Elizabeth Murphy declaring that she was in the events that had happened entitled to one-half of the funds in Court, and that the other half was the property of the Most Reverend William Walsh, Roman Catholic Archbishop of the Diocese of Dublin, to be applied by him in such charities as he should select.

There was a cross-notice served on behalf of Margaret Richardson, widow and administratrix of John Kinsley Richardson, asking for a declaration that the trust or bequest of half of his residuary estate made by the will of the testator John Kinsley to the Roman Catholic Archbishop having pastoral jurisdiction for the time being in the city of Dublin to be applied by him in such charities as he should select for the

repose of the souls of John Kinsley, his wife, and parents, was not a good charitable bequest, and was void for uncertainty; and that therefore Margaret Richardson, as widow and administratrix of John Kinsley Richardson, was entitled to one-half of the funds in Court standing to the credit of the suit.

Miles Kehoe, K.C. (with him *James O'Connor*), for Elizabeth Murphy.

Geoghegan, for Margaret Richardson:—

As regards the bequest of half the residuary estate to the Archbishop of Dublin, the trust is void for uncertainty: first, because this is not a charitable gift; secondly, because, if at all charitable, the purposes impressed on the bequest by the testator are impossible to be understood, executed, or controlled by this Court. It is clear that the testator made his own dictionary, and that his meaning of "charitable" in this residuary gift was intended to express the same thing as he has stated in the forefront of the will, where he gives £30 for Masses—1, for the repose of his own soul; 2, for the repose of his wife's soul; and 3, for the repose of the souls of his parents. The construction of the document clearly points to the second gift to the Archbishop for such charitable purposes as he shall select, being also a gift for Masses. If that is so, there being no direction that the Masses are to be said in public, the gift fails: *Attorney-General* v. *Delaney* (1), and the bequest reverts to the next-of-kin. It is a gift for an indefinite purpose, and even if a charitable purpose is intended, it is not sufficiently expressed, and the trust is bad for uncertainty: *Morice* v. *Bishop of Durham* (2); *Williams* v. *Kershaw* (3); *Blair* v. *Duncan* (4). In *Re Macduff* (5) a bequest of money for charitable or philanthropic purposes was held not to be a good charitable bequest, because there may be pious or philanthropic purposes which are not charitable, and the trustees of the will in that case could have applied the money to purposes

(1) I. R. 10 C. L. 104.
(2) 10 Ves. 522.
(3) 5 Cl. & Fin. 111.
(4) [1902] A. C. 37.
(5) [1896] 2 Ch. 451.

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which might or might not be charitable in the technical sense. See judgment of Lindley, L.J., at p. 464 of the report.

[THE MASTER OF THE ROLLS: The leading word in the gift is "charitable." A gift for Masses to be celebrated in public in a place of worship would be a charitable gift within the decisions, and it may be that a gift for Masses to be celebrated in private is not a charity; but if "charitable" is the dominant word, it devolves on the legatee to devote the money to such purposes only as the law considers charitable.]

The power of selection among *charitable* objects is not given to the Archbishop, and neither a class nor individuals are indicated by the testator for selection by the Archbishop, and therefore the trust is void. It is for such charities as the legatee in his discretion shall select, but there is not an overriding charitable purpose, for the substantial and commanding purpose is for the repose of the souls specified in a strongly selfish sequence. It is for such charities as the legatee in his discretion shall select for the impossible purpose specified, and such an attempted gift cannot be supported as a charitable legacy: *Morice* v. *Bishop of Durham* (1).

[THE MASTER OF THE ROLLS: The words are, "In such charities as he shall select for the repose of the souls of myself, my wife, and my parents."]

The Archbishop is not *bound* to apply the money to strictly charitable purposes, and the trust is indefinite, and consequently fails for uncertainty: *Boyle* v. *Boyle* (2). Charity is not the object of the bequest, but the design is to secure a benefit to the testator and his relations, and the trust fails: Jarman on Wills (5th ed.), p. 163; *West* v. *Shuttleworth* (3); *Heath* v. *Chapman* (4).

It is extremely unlikely in this case that the testator knew what the law understands as "charity." It is clear on the construction of the will that the money is intended to be applied for a purpose of such a kind as the testator himself meant by the word "charitable," which clearly is not "charitable" within the decisions, and a mixed purpose of the kind, where no appropriation is made, is void for uncertainty.

(1) 10 Ves. 522.
(2) I. R. 11 Eq. 433.
(3) 2 My. & K. 684.
(4) 2 Drew. 417.

D. F. Browne, K.C., for the Roman Catholic Archbishop of Dublin, was not called on.

Morphy, for the Attorney-General.

THE MASTER OF THE ROLLS:—

Everything that could be said on behalf of his client has been said by Mr. Geoghegan. In my opinion, however, the case is very clear. In the events which have happened the legacy in question took effect, because John Kinsley Richardson died under the age of twenty-five years, whatever the result may be. These are the words of the will—"In the event of my said grandson dying under the age of twenty-five years, then upon the death of my said daughter my trustees are to hold said principal sum and interest in said house, if any, and pay over or assign one-half thereof to my brother-in-law Laurence Murphy or his heirs, for his or their own proper use and benefit, and the other half thereof unto the Roman Catholic Archbishop having pastoral jurisdiction for the time being in the city of Dublin"—that, of course, would be Archbishop Walsh, because he was the Archbishop for the time being at the date of the death of the testator's daughter—"to be applied by him in such charities as he shall select," words which plainly show that he was made a trustee. Suppose the gift had stopped there, there could be no question that there was a gift to the legatee in trust, to be applied by him in such charities as he shall select, and that would give him a range of discretion in selecting an object within the scope of such purposes as the law considers charities. There is a trust created; and the law favours charities in this respect, that there may be a valid charitable bequest if there is a person with power of selection among charitable objects in existence, though, if the objects are not charitable, the gift might be void for uncertainty. If there is no trust imposed for a particular object, and the gift is for general charitable purposes, the selection is left to the discretion of the legatee if there is a trust, and the only question is whether or not the bequest is a valid charitable gift. But where the gift is for charity generally without the intervention of trustees, and where no definite object is pointed out, the application is directed by the Royal

M. R. 1903. RICHARDSON *v.* MURPHY.

sign manual. The gift, however, in this case does not stop at the words I have read, but it is to such charities as he shall select "for the repose of the souls of myself, my wife, and my parents." These words, Mr. Geoghegan says, are to be read in connexion with the first gift with which the will commences, and which in some respects resembles the present one, because the objects there are—first, the repose of the testator's own soul; second, the repose of the soul of his late wife; and thirdly, the repose of the souls of his father and mother; and these are the same objects as those specified in the gift now under consideration. But the first gift in the will is distinctly for Masses, and distinctly specifies the place where they are to be celebrated. He says: "I will and bequeath three sums of £10 each unto the Rev. Mathew M'Entee, of the Star of the Sea Chapel, Sandymount, to procure the celebration of Masses—first, for the repose of my own soul; second, that of my late wife Anne Kinsley; and third, that of my father and mother." Whether that of itself is a valid gift or not I have not now to decide. It has not been challenged. But the argument is that I must take the second gift as if it were the same as the first. The distinction between them is obvious. In the first gift the testator directs Masses to be said for the repose of the souls of himself, his wife, and father and mother, and in the second there is not a word about Masses. It is possible, and, if I were at liberty to conjecture, probable, that the testator imagined that the Archbishop might probably devote the whole or part of the bequest in the celebration of Masses, but it does not follow that any part of it was necessarily to be spent for private Masses not charitable. A gift for Masses to be celebrated in private without reference to the benefit of the community or to public worship or the like may be wholly void; but where the gift is for Masses to be celebrated in public it is a valid charitable gift, because the celebration of Masses is a most important part of the public worship of the Roman Catholic Church. I think I was the first Judge who decided this point; but at any rate it is now firmly established. And supposing that the testator intended that a portion of the residue of his estate should be applied for the celebration of Masses, still the legatee is bound in the trust by the leading word "charitable," and the devotion of any part of the fund to the celebration of Masses in

private, which would not be a charitable purpose, would be a breach of trust on the part of the legatee. In my opinion there is a legal trust for charitable purposes; and even if the gift were to be narrowed down to one for the celebration of Masses, I am not prepared to hold that it is not a valid charitable gift. If the gift is for Masses, it is clearly for the celebration of such Masses as come within the rule as being in themselves a charity; that is, for Masses to be celebrated in public, and not for Masses to be celebrated in private. It will be the duty of the Archbishop to see that the purposes are such as the law recognises as charitable. That there may be a charitable application of the fund, beneficial in the way indicated, but not by means of Masses, I see no reason to question. I therefore think that the bequest is not one merely for Masses, and so is not void; and even if it were a gift for Masses, I think, under the circumstances, it is a gift necessarily for a charitable object, which may be effectuated by its application, if for Masses, then for such Masses as are charitable.

As to the other ground put forward, viz. that the gift is void for uncertainty on the principle of *Morice* v. *Bishop of Durham* (1) and other cases, they do not decide that a gift to a trustee, with power of selection among charities, is not a valid charitable gift. They only decide that where money is given for charitable and other, even philanthropic, purposes, so that it would be open to the legatee without departing from the words of the instrument creating the trust to spend the whole of the money for charitable or for philanthropic purposes, or partly for one and partly for the other, then if the legatee intended to apply the whole in philanthropic or other non-charitable purposes, and the gift transgressed the ordinary rule against perpetuity, it would be void, as no one can tell whether the purpose expressed in the devise is a charitable one or not, and the gift is void. That is the very thing about which the testator in this case has left no uncertainty. There is no uncertainty in the specific application of the legacy among charitable objects. Every farthing is to be spent in charity. I should have been glad if I could have acceded to the view put forward by Mr. Geoghegan on behalf of this poor woman, but I

(1) 9 Ves. 399; 10 Ves. 522.

M. R. 1903. RICHARDSON *v.* MURPHY.

have no power to do so. It may be suggested that perhaps in the selection of charitable objects there may be a discretion in the Archbishop to give a portion of the fund to the plaintiff as a proper object of charity. That is a matter which the Archbishop must himself decide, and in reference to which it might possibly be wise to make some application to him. I, however, have nothing to do with that. All I can say is that it appears to me that this is a perfectly valid gift for charitable purposes, and that therefore the application of Margaret Richardson must be refused.

R. W. L.

Appeal. 1903. March 12.

Margaret Richardson appealed to the Court of Appeal.

Geoghegan, for the appellant.

D. F. Browne, K.C., for the respondent, was not called on.

The Court (LORD ASHBOURNE, C., and FITZ GIBBON and WALKER, L.JJ.) dismissed the appeal.

Solicitor for Elizabeth Murphy: *John Gore.*
Solicitors for Margaret Richardson: *Geoghegan & Co.*
Solicitors for the Roman Catholic Archbishop of Dublin: *O'Hagan & Son.*
Solicitor for the Attorney-General: *R. G. Warren.*

G. Y. D.

Ross, J.
1902.
June 4, 10, 17.

IN THE MATTER OF THE ESTATE OF GEORGE LYSAGHT AND GEORGE LINGARD LYSAGHT, OWNERS; CONTINUED IN THE NAMES OF SAID GEORGE LYSAGHT AND ALEXANDER KNOX M'INTIRE AND JOHN ARTHUR MACONCHY, OFFICIAL ASSIGNEES IN BANKRUPTCY OF THE SAID GEORGE LINGARD LYSAGHT, AND OF GEORGE LYSAGHT, JUNIOR, OR SOME OR ONE OF THEM, AS OWNERS; EX PARTE ROBERT PEEL LEATHAM AND MURDOCK GREEN FOLEY, PETITIONERS; CONSOLIDATED WITH THE MATTER OF THE ESTATE OF GEORGE LYSAGHT AND GEORGE LINGARD LYSAGHT, OWNERS AND PETITIONERS; CONTINUED IN THE NAMES OF SAID GEORGE LYSAGHT AND ALEXANDER KNOX M'INTYRE AND JOHN ARTHUR MACONCHY, OFFICIAL ASSIGNEES IN BANKRUPTCY OF THE SAID GEORGE LINGARD LYSAGHT AND OF GEORGE LYSAGHT, JUNIOR, OR SOME OR ONE OF THEM, AS OWNERS; AND IN THE MATTER OF THE ESTATE OF GEORGE LYSAGHT, OWNER; THE PROVINCIAL BANK OF IRELAND, LIMITED, PETITIONERS.

Mortgage—Appropriation of payments—Marshalling securities—Voluntary deed.

Lands were subject to incumbrances ranking in priority as follows: (*a*) mortgage for £2000 vested in A.; (*b*) £1500 portions for the younger children of the owner; (*c*) mortgage for £1000 vested in A.; (*a*) and (*c*) were collateral securities for a larger mortgage debt of £4000. The charge (*b*) was created by a voluntary postnuptial deed which contained no covenants for title. By deed made between the owner, his eldest son, and trustees, to which A. was not party, certain policies of insurance were assigned in trust to pay the proceeds when realized in discharge of (*a*) and (*c*), described in the deed as "£3000 part of said sum of £4000," so as to relieve the inheritance of the lands. The amount secured by some of the policies having been received by the trustees, they paid £1000 thereout to A. on account of his demand, without any express appropriation. Six months afterwards A. appropriated this sum to payment of (*c*), which would not be reached by sale of the estate:—

Held, 1, that A. was entitled to make such appropriation; 2, that the younger children of the owner were not entitled to marshal the securities against A.

Ross, J.
1902.
In re LYSAGHT'S ESTATE.

MOTION on behalf of Henry S. Killery and Jane Mary Lysaght (trustees of an indenture dated 10th August, 1878), and of the six younger children of the late owner George Lysaght, deceased, that the order made in this matter on the 22nd January, 1901 (fixing the priority of incumbrances, and directing payment of interest by the receiver), be amended by reducing the principal sum of £2000 at No. 3 to the sum of £1000.

This estate being limited to George Lysaght for life, with remainder to his eldest son George Lingard Lysaght in tail, subject to £3000 portions for the younger children of George Lysaght, the father and son, having executed a disentailing deed, duly enrolled, borrowed sums amounting to £2000 from the North British Mercantile Insurance Company, secured by mortgage of the lands, and by policies effected with the Company, one on the life of George Lingard Lysaght and the others on the life of George Lysaght. Subsequently, by indenture of 17th March, 1869, to which George Lysaght and George Lingard Lysaght were parties, the said George Lysaght was empowered to appoint a further sum of £1500 amongst his younger children. This deed contained no covenants for title. The younger children were not parties to it, and from them no consideration proceeded, the only consideration being a release by George Lysaght of the power to jointure an after-taken wife.

After this deed a further sum of £1000 was advanced on mortgage of the lands and collateral policies.

By deed, dated the 22nd July, 1878, Henry de Blaquiere and John Langley, trustees of the settlement executed on the marriage of Matthew Langley and Adelaide C. Langley, advanced £4000 to George Lysaght, George Lingard Lysaght, and Georgina Lysaght, one of the younger children, on an assignment of £1000 appointed to Georgina Lysaght as her portion (1), and on a transfer of the mortgages, so far as they affected the lands.

The policies were transferred to George Lysaght and George Lingard Lysaght, and by deed, dated 10th August, 1878, these

(1) This appointment was set aside by Ross, J., on the 6th March, 1902, as a fraud on the power (2 New Ir. Jur. Misc. 167), and his Lordship's judgment was affirmed by the Court of Appeal.

policies were vested in trustees upon trust to discharge £3000, portion of the mortgage for £4000 vested in the said de Blaquiere and Langley so as to relieve the inheritance of the lands from the said charges. Mr. Killery and Miss Jane Mary Lysaght were the present trustees of this deed.

George Lingard Lysaght predeceased his father when the policy on his life was realized, and the trustees paid to Messrs. Leatham and Foley, who had then been appointed trustees of the Langley settlement, £951 7*s.* 5*d.* on account of their mortgage debt. This sum was applied by the mortgagees in payment of interest which nearly exhausted the amount, and a small surplus which remained over was applied by them in reduction of their puisne charge of £1000.

No question as to priority arose during the life of George Lysaght, but upon his death, which occurred on the 31st January, 1900, the charges for his younger children became payable, and the order of the 22nd January, 1901, was accordingly made on the application of the mortgagees who had carriage of the proceedings. The schedule of priorities as settled by this order was in substance as follows:—1, £1000 appointed to Georgina Lysaght and assigned to the mortgagees; 2, younger children, £2000, residue of £3000 charged for portions; 3, Leatham and Foley, £2000; 4, younger children, £1500; 5, Leatham and Foley, £1000. This last figure was erroneously inserted in the order as drawn up instead of £911 19*s.* 7*d.*, which as appeared from Mr. Foley's affidavit, on which the order was based, was the principal sum due on foot of No. 5, after crediting the payment already mentioned.

After the death of the said George Lysaght, the amount of the remaining policies was lodged in the Chancery Division by the Company, and an originating summons was issued by Leatham and Foley, seeking for payment of same on foot of their mortgages, after providing for costs, expenses, and certain salvage claims.

By order, dated the 6th May, 1901, the Master of the Rolls made an order for payment of £1000 out of said policy moneys to Mr. Killery and Miss Lysaght, as trustees of the said deed of 10th August, 1878, on production to his Honor of a statement in

Ross, J. 1902. *In re* LYSAGHT'S ESTATE.

writing as to how they proposed to apply same. They accordingly lodged at Chambers the following undertaking :—

"We, the undersigned, being the defendants above named and the present trustees of the deed of 10th August, 1878, hereby respectively request the Court to pay to the plaintiffs in this action out of the funds in Court to the credit of this action the sum of £1000 on foot of the plaintiffs' demand, in order that interest on the plaintiffs' demand may be reduced.

"Dated the 7th May, 1901.

"HENRY S. KILLERY.
"JANIE MARY LYSAGHT."

On receipt of the £1000 they on the 30th August, 1901, remitted same to Mr. Foley on behalf of himself and Mr. Leatham, making on this occasion no appropriation.

Mr. Foley gave a receipt generally on account.

Mr. R. G. Hunt was appointed a trustee of the Langley settlement in place of Mr. Leatham, who retired, and on the 13th March, 1902, Messrs. Hunt and Foley served notice in writing upon Mr. Killery and Miss Lysaght appropriating the £1000 so paid in discharge of the interest and principal on foot of their incumbrance No. 5, which admittedly would not be reached by the proceeds of sale. The object of this motion was to compel the appropriation of this sum to No. 3, in which case it was believed that No. 4 would be in part reached.

H. Morgan Byrne, in support of the motion :—

The payment even if made generally should be appropriated to the earlier demand : *Clayton's Case* (1). The deed of 22nd July, 1878, was a consolidation mortgage constituting a single debt, and absorbing the several collateral mortgages then in existence. The payment clears off that whole debt *pro tanto*, and leaves only a balance due. There has been an unreasonable delay in appropriation even if appropriation were possible. The proceedings in the Rolls Court show that the appropriation for which we contend was that contemplated by all parties. The object of the payment is expressly stated to be to reduce interest on the mortgagees' demand ; neither principal nor interest was

(1) 1 Mer. 605.

likely to be paid on foot of No. 5. The appropriation made by the mortgagees would work most inequitably as regards the younger children.

W. Green, for the mortgagees:—

There was no appropriation in the Rolls Court. No question of the kind was argued there. The mortgagees are the *cestui que trusts* of Mr. Killery and Miss Leatham; as trustees they were bound to make such an appropriation as would be most favourable for the mortgagees. By joining in the present application they are committing a flagrant and gross breach of trust closely resembling fraud. *Clayton's Case* (1) was the case of an ordinary banking acount, in which the first item on the debit side is discharged or reduced by the first item on the credit side. The *ratio decidendi* appears in Sir William Grant's judgment at page 608. It has no application to a payment made generally on account of several distinct debts. *Clayton's Case* (1) has been recently considered and explained in "*The Mecca*" (2), which is the more important, as it was the reversal of the judgments of Bruce, J., and the Court of Appeal by the House of Lords. The real principle of *Clayton's Case* (1) is stated in the judgment of Lord Macnaghten (3). His judgment is also an express authority that the present appropriation was made in ample time. The creditor has the right of election "up to the very last moment." The rule had previously been stated in similar terms by Lord Denman in *Philpott* v. *Jones* (4), and by Tindal, C.J., and Bosanquet, J., in *Mills* v. *Fowkes* (5).

There was no unreasonable delay here. The younger children were professionally represented when the order of the 22nd January, 1901, was made, and had notice from the affidavit that the similar payment on foot of George Lingard Lysaght's policy was similarly appropriated.

June 10.

On the application of H. Morgan Byrne, the case was put in the list for further argument.

(1) 1 Mer. 605.
(2) [1897] A. C. 286.
(3) *Ibid.* 293–296.
(4) 2 Ad. & Ell. 41, at p. 43.
(5) 5 Bing. N. C. 455, at pp. 462, 463.

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H. Morgan Byrne:—

Even if the mortgagees were entitled to appropriate, the younger children have a right of marshalling against them. They had two funds to resort to for payment of No. 3, the lands and the policies. No. 4 was a charge on the lands only, and if the owners of No. 3 exhaust the lands, the owners of No. 4 are entitled to stand in their shoes and to be recouped out of the policies: *Aldridge* v. *Forbes* (1), where the parties held entitled to marshal were, as here, merely volunteers: *Mower's Trusts* (2); *Re Cornwall* (3).

W. Green:—

In *Mower's Trusts* (2) the third mortgagee took expressly subject to the two first incumbrances. Such also was the case in *Aldridge* v. *Forbes* (1), as appears from the report at 4 Jur. 20. *Cornwall's Case* (3) is only an illustration of the fact that the assignee in bankruptcy stands merely in the place of the bankrupt.

But really the doctrine of marshalling has no application here.

In Ireland, at all events, the doctrine is established on a sure basis, and within clearly marked limits.

The leading case is *Averall* v. *Wade* (4), where there was a settlement for valuable consideration with a covenant against incumbrances which concurring circumstances were the foundation of the decision. In favour of a purchaser the covenant was enforced—not by giving damages—but by specific performance: see judgment, p. 260.

Probably the most valuable reading on the doctrine of marshalling of securities, remarkable for distinctness and lucidity, is to be found in another Irish case, *Ker* v. *Ker* (5), in which the then Court of Appeal in Chancery, Lord O'Hagan, C., and Christian, L.J., reversed the decision of Walsh, M.R. (I. R. 3, Eq. 489). That case arose on a claim for contribution, the converse of a right to marshal, and it was held that contribution was enforcible against a volunteer. The great value of this case is the exposition it contains of the principle of *Averall* v. *Wade* (4), on which we

(1) 9 L. J. Ch. 37.
(2) L. R. 8 Eq. 110.
(3) 3 Dr. & War. 173.
(4) Ll. & G. temp. Sugden, 252.
(5) I. R. 4 Eq. 15.

rely and which it fully endorses. Christian, L.J., puts at p. 19 the question of contribution between devisee and heir-at-law. The Lord Chancellor at page 21 says:—"No authority has been produced to establish that a voluntary conveyance without a covenant against incumbrances vests anything in the grantee save the estate which the grantor had with all its incidents"; and he then distinguishes *Averall* v. *Wade* (1) as a case in which there was valuable consideration and the covenant. The judgment of Christian, L.J., is an exhaustive treatise upon the subject of marshalling. [Counsel read pp. 29–31 of the Lord Justice's judgment.]

Applying these authoritative judicial utterances, there is no possibility here of calling in aid the doctrine of marshalling against the mortgagees. The two essential points are wanting: valuable consideration from the parties seeking to marshall or a covenant for title by their grantor.

Ross, J.:—

June 17.

This is an application to vary the priority order by substituting £1000 instead of £2000 appearing at No. 3 in the schedule as belonging to Mr. Foley and Mr. Hunt. The contention of the applicants is that a sum of £1000 recovered by these gentlemen in certain proceedings before the Master of the Rolls must be deducted from the charge of £2000 appearing at No. 3.

Under his marriage settlement, made in 1846, George Lysaght took a life estate in the lands for sale in this matter, subject *inter alia* to a trust term created for the purpose of raising £3000 for younger children, with remainder to his first and other sons in tail male. The eldest son was George Lingard Lysaght, and there were several younger children. George Lingard Lysaght and his father barred the entail in 1869. At this time the father's life estate had been mortgaged to the North British and Mercantile Assurance Company, first for a sum of £1000, and secondly for a sum of £300. After the entail was barred a further sum of £700 was borrowed by the father and the son, and this with the other two sums borrowed were charged on the fee-simple and inheritance—in all £2000. Puisne to these charges a further charge of £1500 was created in favour of younger children, and

(1) Ll. & G. temp. Sugden, 252.

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subsequently there were two other mortgages executed for £500, one to the same company and another to William Smyth, solicitor.

In the year 1878 Messrs. de Blaquiere and Langley, who were trustees, and whose estate is now vested in Mr. Foley and Mr. Hunt, advanced £4000 on a consolidated mortgage. The North British and Mercantile Company and Mr. Smyth were paid off and assigned their securities. Georgina Mary Lysaght assigned a £1000, which being part of the £3000 had been appointed to her. This appointment has since been set aside.

Although the mortgage was a consolidated mortgage, each constituent mortgage retained its own priority.

We now come to a deed of 10th August, 1878, made by George Lysaght, George Lingard Lysaght, and trustees. It recites that it was the intention of the parties that inasmuch as George Lingard Lysaght had allowed the £3000 to be thrown on the fee and inheritance, certain policies of assurance which were to be kept up by his father were to be conveyed to the trustees, who were thereout to pay off the mortgages for £3000 now vested in Mr. Foley and his co-trustee in order to relieve the inheritance. Proceedings were taken in the Court of the Master of the Rolls for the purpose of carrying the trusts of this deed into execution. A substantial sum was paid to Mr. Foley and his co-trustee which was applied by them in paying off arrears of interest that had accrued on the consolidated mortgage. There was a small sum in excess of what was due for interest, and this, according to the affidavit of Mr. Foley, was applied in paying off the capital *pro tanto* of the lowest charge of £1000. The order fixing priorities founded on that affidavit appears to take no notice of this fact, and the Receiver is directed to pay interest on the entire £1000, No. 5 in the schedule.

What I am immediately concerned with is this: Mr. Foley and his co-trustee in May, 1901, applied for and obtained from the Master of the Rolls another £1000 on foot of the policies. This they seek to apply in satisfaction of No. 5, their lowest charge. On the other side it is contended that they must apply it in satisfaction of the highest and earliest charge, and thus relieve the lands for the benefit of the younger children. I think

it is plain that the Master of the Rolls' order does not appropriate the £1000 to the satisfaction of any constituent part of the trustees' charge.

The payment was made in May, 1901, a notice was served in March, 1902, appropriating the payment to No. 5. Is this too late?

The doctrine of the appropriation of payments only applies in a case where there are separate and distinct accounts. It is said here that because there is a consolidated mortgage all the accounts are to be treated as one. This argument is without substance; it is beyond doubt that each of the component mortgages retains its own priority, and in this way remains a distinct account. The law is that when there are several debts due by one person to another, the debtor when he pays has a right to say to which of the debts the payment is to be attributed. But he must do this at the time of payment. If he does not do this his right immediately passes to his creditor, who can apply the payment as he thinks right. According to the civil law the creditor was thereupon bound to elect to what debt the payment was to be appropriated. In the absence of such an election, at once, or within a reasonable time, appropriation was made according to certain rules of presumption depending on the priority or nature of the debts. This is no longer the law of England. When the option devolves on the creditor he is not called on to exercise it at once, or within a reasonable time. He may exercise it up to the last moment in any way he thinks for his benefit (1).

In this case there has been no appropriation by the debtor, and there has been an express appropriation by the creditor; and in that state of circumstances there is no room for presumptions. He elects, as is natural, to apply the payment to one of his debts that is badly secured, and not to debts that are well secured. So far as the law on appropriation of payment goes, my view is altogether against the contention of the applicants.

When the argument had concluded, Mr. Morgan Byrne applied for liberty to re-argue it on another ground.

His contention is that although the policies were not comprised in the mortgage now vested in Mr. Foley and his co-trustee, in consequence of their adopting the proceedings in the Master of

(1) See "*The Mecca*," [1897] A. C. 286.

Ross, J.
1902.
In re LYSAGHT'S ESTATE.

the Rolls' Court they are in the same position as if the policies had been included in his £2000 mortgage, and that, therefore, on the doctrine of marshalling the younger children are entitled to throw over the £2000 on the policy fund in so far as it will suffice to pay it, so as to relieve the lands for their benefit.

The deed of 17th March, 1869, is, however, a purely voluntary deed. It contains no covenants against incumbrances or for further assurance. Can Mr. Foley and his co-trustee, who are purchasers for value, be compelled to marshal for the benefit of such volunteers? If the doctrine of marshalling is founded on specific performance, as was the opinion of Lord St. Leonards and Lord Justice Christian, the younger children can have no claim. They have no covenants, and the nature of their instrument raises no equity in their favour to entitle them to specific performance.

One case has been cited which appears at first sight to support the contention of the applicants. It is the case of *Aldridge* v. *Forbes* (1). In this case there was, firstly, a mortgage on two estates; secondly, a charge created by voluntary settlement on one of them; and, thirdly, a mortgage on the two which was vested in the owner of the first. There the Court marshalled the estate in favour of the volunteer. The reason for this decision appears very plainly stated in 4 Jur., p. 20; it was expressly agreed that the last mortgage should not affect or prejudice the rights of those claiming under the voluntary settlement. It is always possible by express contract with a subsequent purchaser for value to protect a voluntary deed. The voluntary deed is good against the settlor, and it is good against those who contract that their charge is not to affect it. But here we have nothing of the kind—the last mortgagees have notice of it as a voluntary deed, but that in no way entitles the volunteers to marshall against them in the way suggested.

I have seldom listened to an abler argument than that which was addressed to me in this case by Mr. Morgan Byrne.

Motion refused with costs.

Solicitors for the applicants: *Mooney & Sons.*
Solicitor for Messrs. Foley and Hunt: *M. G. Foley.*

W. C. S.

(1) 9 L. J. Ch. 37; 4 Jur. 20.

IN THE MATTER OF THE ESTATE OF EDWARD BROWNE, TRUSTEE FOR SALE UNDER THE WILL OF JAMES BROWNE, OWNER AND PETITIONER.

Ross, J.
1903.
Feb. 12, 24.

Debtor and creditor—Appropriation of payments—Right to appropriate—Intention of creditor.

A mortgaged his lands of B to secure £500. After his death this mortgage was assigned to the S. Insurance Company. His widow was a party to the assignment, and covenanted to pay the mortgage debt and interest. Under A's will the lands of B were devised in trust for sale for payment of legacies. His widow raised these legacies from the S. Insurance Company by several mortgages, and she personally covenanted to pay the principal and interest thereon. She died, and her estate, which was insolvent, was administered in the Court of Chancery. The N. B. and M. Insurance Company, in whom the interest of the S. Insurance Company was vested, proved for the entire of the mortgage debts, under the personal covenants, and received several dividends thereon. The lands of B were sold in the Land Judge's Court. The N. B. and M. Insurance Company claimed the right to appropriate these dividends towards the subsequent mortgages, and to be paid the entire of the £500 out of the proceeds of the sale of the lands :—

Held, that, as they had proved in the action for the £500, they could not appropriate.

RULING of Final Schedule, and Motion by the solicitors having carriage that on the ruling of the schedule they would ask the Court to decide whether the dividends received from Julia Browne's estate upon foot of the covenant by Julia Browne for payment of a mortgage for £500 must be given credit for against the principal sum of £500 thereby secured.

James Browne, on the 14th of July, 1852, executed a mortgage of the lands for sale herein, to secure the sum of £500 to Mary Tighe and others. This mortgage was assigned to the Scottish Provincial Insurance Company on the 14th of December, 1877, and Julia Browne, the widow of James Browne, joined in the deed of assignment, and covenanted for the repayment of the £500 and interest.

Ross, J.
1903.

In re BROWNE'S ESTATE.

James Browne by his will bequeathed a number of legacies to be paid by the trustees for sale thereof out of the proceeds of the sale of the lands, and most of these legacies were paid by Julia Browne from moneys advanced by the Scottish Provincial Insurance Company, and secured by mortgages dated the 8th of February, 1877, the 5th of June, 1877, and the 6th of July, 1878; all these deeds contained covenants by Julia Browne to pay the several sums advanced with interest; and under these three deeds, and the assignment of the 14th of December, 1877, the total sum of £5900 was due to the Scottish Provincial Insurance Company. These sums were assigned by the Scottish Provincial Insurance Company to the North British and Mercantile Insurance Company on the 20th of August, 1891.

Julia Browne, who was tenant for life of the lands, died on the 16th of July, 1891, and on the 3rd of May, 1892, a decree for the administration of her real and personal estate was made in the Court of the Vice-Chancellor. The Insurance Company made claims in the administration action on foot of the covenants by Julia Browne contained in all the mortgages, including the assignment of the 14th of June, 1877, of the sum of £500. The Chief Clerk in his certificate, filed on the 27th of July, 1894, found that all the sums, amounting to £5900, were due, but that no interest was due thereon.

On the death of Julia Browne Edward Browne, the petitioner, entered into receipt of the rents, and duly paid the interest on the £500 up to the present. On the schedule of incumbrances the £500 appeared; then another charge for £1000; and the residue was stated to be payable to the trustees of the will.

In the administration action there were five allocations, and sums amounting in all to £820 10*s.* 10*d.* were paid to the North British and Mercantile Insurance Company, the proportion of which applicable to the sum of £500 would be £69 10*s.* 7*d.*

Wylie, K.C., for the owner:—

The sum of £69 10*s.* 7*d.* is the proper proportion of the £820 10*s.* 10*d.* which represents the £500, and this sum should be allowed as against the principal sum as paid on account of it; no interest was due on it. The interest on the personal debts

stopped at the date of the decree, and as the interest has been paid on the £500 to date, this payment of interest also should be given credit for as further payment of principal. If a person has a security he must either stand by it, and prove for nothing, or value it, and prove for the balance, or abandon it and prove for the entire. This would be different if the mortgage was on the estate of a third party. The Company claim to appropriate the dividends to the payment of the interest on the other charges, and to prove here for the entire £500, but no question can arise on the matter of appropriating as the Court does it. The effect of the dividends paid in the Vice-Chancellor's Court is the same as if each of the mortgages were vested in a separate person, and the payments were made to them on account of their several mortgages; the Chief Clerk certifies these separate items of charges, giving the figures. If the appropriation were permitted, the Company would have an advantage over the other creditors.

O'Connor, K.C., for the Insurance Company:—

We submit that we are entitled to appropriate these sums to the interest due to us. It is said that we would have an advantage thereby over the other creditors, but we get it only because we are secured creditors and have the other estate. A mortgagee is entitled to pursue all his remedies at once. If there were only the one debt, the £500 due to us, we would have been entitled to prove both for principal and interest, only one proof; and it is the same if there are several debts: see Ashburner on Mortgages, page 233, as to the right of the creditor to allocate his security. Although the amount must be ascertained by taking both the principal and interest, still it is open to the claimant to appropriate. It must be remembered that all the charges were securities on the same estate. At no period when the payments were made was the interest cleared off, as interest on all but the £500 was always in arrear since the date of the Chief Clerk's certificate.

Wylie, K.C., in reply:—

The mortgages other than the £500 are not on the schedule at all; they are not charged on the lands at all, but only on the proceeds of the sale.

Ross, J.
1903.

In re BROWNE'S ESTATE.

Feb. 24.

Ross, J. :—

The facts of this case are shortly as follows :—James Browne, whose estate has been sold in this Court, mortgaged it for £500 in the year 1852. After his death the mortgage was assigned to the Scottish Provincial Insurance Company. His widow Julia Browne was a party to that assignment, and covenanted to pay the £500. On the death of the widow her estate was administered in the Court of the Vice-Chancellor. It appeared that she had executed several mortgages to the said Insurance Company, containing the usual covenants to pay the money advanced and interest. Her estate proved insolvent. The Company made claims in the administration matter on foot of the covenants in all their mortgages, including that contained in the assignment of the £500, and obtained dividends in respect of it at intervals, amounting in all to £69 10*s.* 7*d.* After debiting them with all the dividends they received, there still remains due to them in respect of all the covenants a very large sum. It is contended on behalf of the parties interested in this matter that the £500 mortgage has been paid off to the extent of £69 10*s.* 7*d.* On the other hand, the Company contend that they are entitled to appropriate this sum to the satisfaction of the other claims, and to claim the full £500 here. There was nothing to oblige the Company to prove in the other matter. They might have then recovered the entire £500 here out of the proceeds of the sale. But having once claimed on foot of the covenant to pay the £500—having obtained a dividend on foot of this very £500—are they to be allowed to put this dividend to another account ?

Suppose they had sued the widow on her covenant and had recovered judgment for £500 and interest, would it be open to them to contend that they could put the sum so recovered to another account, and proceed to realize their security here as if they had never sued at all ?

All questions connected with the appropriation of payments are questions of intention. It cannot be denied that it is the right of a debtor who owes several distinct debts to appropriate his money at the time of payment to any one he pleases, and the creditor is bound to accept this appropriation. Otherwise a debtor would never be able to free one of his pledges until he had dis-

charged his entire liability. In case the debtor does not so appropriate it is the right of the creditor to appropriate the money in any way he may think fit down to the last moment: see *Cory* v. *Owners of "The Mecca"* (1).

When, however, a creditor brings an action to recover in respect of a particular debt, it must be presumed that his intention is to appropriate what he recovers to the entire or partial satisfaction of that particular debt. Does it make any difference that he made a claim in the administration matter on foot of this particular debt along with other claims and received a dividend? Clearly not. If he had not claimed on foot of this debt, he would have recovered £69 10*s.* 7*d.* less in dividends. Therefore, he must be taken to have appropriated the dividends so recovered to the partial satisfaction of the £500. From that position he cannot be allowed to recede. I, therefore, direct the Examiner to give credit for the amount mentioned as payment in reduction of the mortgage debt.

Solicitors having carriage: *Meldon & Co.*

Solicitor for the North British and Mercantile Insurance Co.: *Sir George Roche.*

W. C. S.

(1) [1897] A. C. 286.

Meredith, J.
1902.
Dec. 17.
1903.
Jan. 30.

IN THE MATTER OF THE ESTATE OF CECILIA ELIZABETH M'NAUL, A VENDOR.

Landlord and tenant—Land Purchase Acts—Reservation of additional rent on alienation beyond a defined class—Time when alienation takes place.

The additional rent covenanted to be payable in respect of an alienation to a person other than a child or grandchild of the person alienating (which covenant was held in *In re M'Naul's Estate*, [1902] 1 I. R. 114, to be a valid covenant to be inserted in a fee-farm grant) was *held* to have become payable upon the execution of the vesting order, and therefore the entire additional rent, and not the mere prospective liability thereto, is to be redeemed as an existing superior interest on a sale under the Purchase of Land (Ireland) Acts.

SETTLEMENT by the Judicial Commissioner of a submission to arbitration between the vendor and Dr. Anthony Traill.

Dr. Anthony Traill, S.F.T.C.D., was the owner of a fee-farm rent of £6 8*s*., payable by the vendor, under a fee-farm grant of the 7th June, 1852, out of the premises for sale. The fee-farm grant contained a covenant by the grantee to pay an additional rent if the lessee, his heirs or assigns, assigned or demised the lands, without the grantor's consent, to a person or persons other than the child or grandchild of the person so aliening or demising the same. The grantee under the fee-farm grant sold to her tenant under the Land Purchase Acts, and it became necessary to have the fee-farm rent redeemed. Meredith, J., following *Billing* v. *Welch* (1), held that the covenant to pay the additional rent was void, but the Court of Appeal reversed that decision, holding that the covenant was valid, and that regard should be had to it in fixing the redemption fine. See the case reported as *In re M'Naul's Estate; Ex parte Traill*, in [1902] 1 I. R. 114, where the facts and the covenant are fully set out.

The vendor and Dr. Traill having failed to agree to the form of the submission, it was settled by the Examiner, and came before Mr. Commissioner Lynch on the 22nd of July, 1902, who referred

(1) I. R. 6 C. L. 88.

it to the Judicial Commissioner. When the matter came before Meredith, J., it was adjourned till the present date to enable the vendor and Dr. Traill to come to some arrangement as to a pending action in the King's Bench Division for the recovery of the penal rent. On the 2nd of July, 1902, Dr. Traill commenced an action against the vendor to recover £26 4*s.* 3*d.*, being the arrears of the ordinary rent and the penal rent from the date of the agreement entered into between the vendor and her tenant up to the 1st of May, 1902. A statement of claim and a statement of defence were duly filed. The defendant brought into Court such portion of the sum claimed in the action as represented the arrears of the rent of £6 8*s.*, and her defences were a denial of the alienation, a plea that the plaintiff consented thereto, a release by lost deed, a traverse of any damage; that by virtue of the vesting order the estate and interest of the vendor was transferred to the tenant; and that neither the agreement nor the vesting order effected an alienation under the covenant. By a consent, dated the 6th of December, 1902, it was agreed between the parties that the action be discontinued, and that the sum lodged in Court be paid out to the plaintiff without prejudice to the defendant's right to rely on the payment into Court in the proceedings pending before the Judicial Commissioner.

Ronan, K.C. (with him *Moore, K.C.*, and *Dixon*), for Dr. Traill:—

Dr. Traill has no power to compel Mrs. M'Naul to purchase, but she can succeed in compelling him to sell. The vendor and her tenant are free agents; but Dr. Traill is drawn in *in invitum*. Consequently the statute must be liberally construed as regards him. Therefore if the power of compulsion is put in force against him, the basis on which to ascertain his rights should be, what would be his position if the compulsory powers were not put in force. Assuming then that the vendor had agreed to sell her interest only to her tenant and no question of the redemption of the superior interest arose, and there was no power to compel it, no doubt there would be a complete alienation, and so the covenant would have become operative. Can it be said that his position is worse when the

Madden, J. 1902.

In re M'NAUL'S ESTATE.

element of compulsion is added? It follows that he is entitled to the increased rent. It may be said that the vendor's act is *in invitum*; but she enters into a voluntary contract, and in pursuance of that the question here arises.

The further question arises, when did the alienation take place? Under the Act of 1896 the alienation is complete when the order for redemption of the superior interest is made; the involuntary party will not be brought in until the matters are settled between the vendor and the purchaser.

It is clear from the fee-farm grant that this covenant is not a covenant against assignment; but here the transaction contemplated was an alienation. Note the definition in section 57 of the Act of 1881 of the words "sale" and "sell," which, and cognate words, "include alienation and alienate with or without valuable consideration." This definition is to be carried into the Act of 1896. Section 31 of the latter Act commences with the words "where any land has been sold"; that is to say the power of redemption of superior interests arises where land has been sold, that is to say alienated.

What was the position of Dr. Traill when the order for redemption was made? The land has been taken away from him, and his rights have been transferred to the purchase-money; consequently between him and the vendor it is impossible for her to contend that when the order for redemption has been made she has not ceased to be his tenant, and that there has not been a complete alienation. At least the execution of the vesting order operates as a complete alienation. It is denied that he consented to the assignment. It is clear then that he is entitled now to the additional rent.

Dr. Anthony Traill, S.F.T.C.D., examined by *Moore, K.C.*, denied having given any consent to the assignment, or that there was a lost deed, or that he agreed to forego the right to the further rent.

Cross-examined by *Harrison, K.C.*, stated that he succeeded to the property in 1875; that the holding was ten miles away from his residence; that he did not know the purchaser, and had thought that the vendor was in possession. He managed the

property through an agent. [Witness read the letters of the 29th of July, and of the 10th of August, 1899 (1).] Mr. Stewart communicated with him; he had authority to consent to take thirty-three years' purchase. No figure was named in the letter of the 6th of November from Mr. Stewart to Mr. Greer, which was lost. [Witness read the letter in reply thereto from Messrs. Greer and Hamilton to Mr. Stewart (2).] He wanted to get such a sum as, when invested, would yield him the same income. The date of the last rent receipt was March, 1901. These letters are set out in the judgment.

The affirmation made by the vendor's solicitor and Dr. Traill's affidavit were put in.

Harrison, K. C. (with him *F. N. Greer*), for the vendor:—

There are two distinct matters before the Court—(1) What is to become of the common law action which Dr. Traill has commenced for two years of the penal rent; and (2) what is the amount of the redemption-money. As to (1), we submit that the action, if it had gone on, would have been dismissed; and as to (2), we submit that the submission should be worded so as to include merely the chance or possibility of the penal rent being payable. If the contention be correct that the vesting order when made related back to the date of the agreement to sell, the vendor would not be liable on the covenant after the date of the agreement, and the purchaser would be the only person to be sued. Can it be said that a mere agreement to do a thing is a breach of the covenant against alienation? See *M'Kay* v. *M'Nally* (3). As all the estate of the vendor had gone out of her, she cannot be sued on the covenant. The Landlord and Tenant Act of 1860 contemplated that no one could assign without the consent of the landlord; but the sale by the vendor to the purchaser under the Land Purchase Acts puts an end to head landlord's interest, and vests it in the purchaser. Up to the Act of 1896, if a middleman agreed to sell to his tenant, the head landlord was not interfered with, and he could have a voice in saying who his tenant was to be; but when the entire fee-simple is transferred the head landlord has no further interest in the holding *qua* holding, and section

(1) *Infra* p. 257. (2) *Infra* p. 258. (3) 4 L. R. Ir. 438.

Meredith, J. 1902. *In re* M'Naul's Estate.

31 only entitles him to be put in the same position on the purchase-money as he was before on the lands. If the present sale had been one to a railway company, and instead of the ascertainment of the price by arbitration and award the tenant had agreed with the company as to the price, and that agreement was made before any arrangement had been come to with Dr. Traill, could he force the company to give him the larger rent? Service of notice to treat is equivalent to an agreement to sell. In his judgment in *In re M'Naul's Estate* (1), Fitz Gibbon, L.J., says:—"He (the grantor) is entitled to the price of the chance or prospect that, if the redemption did not take place, the £5 10*s.* 9*d.* would have been payable on some future alienation to some person other than a descendant of the grantee for the time being." Now, if the railway company had taken the lands they would have given the grantor compensation for the chances of his getting a larger rent. So in the present case Dr. Traill should be put into the position he was in prior to the execution of the vesting order, *i.e.* he should not only be entitled to the redemption paid of the fee-farm rent, but also to that of the *chance* of the increased rent being payable, but not to the redemption price of the increased rent itself.

F. N. Greer:—

A subletting for the entire of the residue of the term would not be a breach of a covenant against assignment in a lease; and an assignment would not be a breach of a covenant not to sublet. These covenants are construed strictly, and the object of the covenant in this case was to prevent a strange tenant being imposed upon the head landlord. Under the Land Purchase Acts, however, the head landlord is entirely swept away; the sale is not a sale of the grantee's interest, but of the grantor's as well, just as if he were himself a party to the agreement. This is not the alienation contemplated by the covenant.

Moore, K.C., in reply:—

As to the additional rent being payable from the date of the agreement, the proviso here is not against assignment, which involves the passing of the legal interest, but against aliena-

(1) [1902] 2 I. R. 128.

tion, which merely involves a change of occupation. This is shown by the definition of sale in sect. 57 of the Land Law (Ireland) Act, 1881. When the agreement here was signed the purchaser went into possession under it. To what his possession is referable is a question of fact for the Court: *Nunn* v. *Fabian* (1). Here the purchaser had a binding contract which was enforceable against the land, subject to the sole condition of an advance being made by the Land Commission. He ceased to pay rent, and only paid the interest named in the agreement, under section 35 of the Act of 1896. All the evidence is only referable to his possession then being that of purchaser. The condition of the advance being sanctioned by the Land Commission was subsequently fulfilled. Such possession, under such a contract, involves parting with possession by taking it from the tenant, the vendor, and putting it into the purchaser, as on the date of the agreement, and it is therefore an alienation within the proviso. It cannot be said that the purchaser is liable under Deasy's Act, as the vendor continued to pay rent.

The agreement in the present case is different from those referred to by Mr. Harrison. From the moment the vendor signs the agreement nothing more has to be done by her: all is done here; and the alienation dates from that time.

MEREDITH, J.:—

1903.
Jan. 20.

On the 22nd May, 1899, Cecilia Elizabeth M'Naul entered into an agreement with her tenant John M'Fall for sale of M'Fall's holding. The agreement was in the form prescribed by the Land Commission for a sale under the Land Purchase Acts, and provided that in case the Irish Land Commission should advance the sum of £500 Guaranteed Land Stock to the tenant for the purchase of his holding, the vendor would sell and the tenant would purchase the same in fee-simple, subject only to the exceptions and reservations therein mentioned, at the price of £500. Now there was no obligation upon Mrs. M'Naul to enter into that contract, but having entered into it she must be taken to have done so with a full, though perhaps wholly imputed, knowledge

(1) L. R. 1 Ch. App. 35.

Meredith, J. 1903.

In re M'Naul's Estate.

of the legal consequences which necessarily followed. On the 27th of March, 1900, the advance was sanctioned by the Land Commission, subject to this variation in the agreement (which variation was acquiesced in by both parties) that the right of fishing was alone to be preserved, and that the vesting order should not be subject to the other exceptions and reservations mentioned in the original agreement. Turning now to the Land Law (Ireland) Act, 1896, it will be seen that sub-sect. 1 of section 31 provides that "Where any land has been sold under the Land Purchase Acts, as amended by this Act, or where land is sold by the Land Judge to the tenant thereof, and an advance under the Land Purchase Acts is made for the purpose of such sale . . . the sale of such land . . . shall be made discharged from all superior interests as defined by this section, or from any of them, and in every such case the land shall be vested accordingly in the purchaser in fee-simple, and such superior interests, or the value thereof, shall become a lien upon and be redeemed or satisfied out of the purchase-money of such land." Sub-section 3 of the same section extends the powers of apportionment and redemption given to the Land Commission to cases of "superior interests." The definition of "superior interests" is contained in sub-section 8:—"The expression 'superior interest' shall include any rent, rentcharge, annuity, fees, duties or services, payable, or to be rendered in respect of the land sold to any person . . . and any estates, exceptions, reservations, covenants, conditions or agreements, contained in any fee-farm grant or other conveyance in fee, or lease, under which such land is held."

Then section 33, sub-section 1, provides:—"For the purpose of the distribution of, or other dealing with, an advance, sections 15 and 16 of the Land Law (Ireland) Act, 1887, and any other unrepealed enactment in the Land Purchase Acts, or this Act, relating to the redemption or apportionment of charges on holdings, or otherwise to the distribution of the purchase-money of a holding, shall apply as if the money were the holding."

Now Mrs. M'Naul (the vendor) held the lands comprised in M'Fall's holding under a fee-farm grant dated 7th June, 1852, and that grant contained a covenant by the grantee which in the then state of the law appeared to be void, and which Mrs.

M'Naul and her advisers undoubtedly regarded as void and of no consequence whatever. That covenant was to the following effect. [His Lordship read covenant, as set out in full, at page 115 of [1902] 1 I. R.]

That covenant has been read in several courts, and almost every line of it is of importance in the view I take of the rights of the parties in this particular case. As I have said, it is plain that neither Mrs. M'Naul nor her advisers considered that covenant of the slightest importance, indeed, I think that if she had been advised not merely by her able solicitors, but by some of the most eminent counsel at the Bar, she would have been told that the case of *Billing* v. *Welch* (1)—a decision of the Court of Queen's Bench pronounced in the year 1871—had conclusively decided the matter in her favour. Dr. Traill, on the other hand, in whom the interest of the grantor in the fee-farm grant of 1852 had become vested, took a different and, as events proved, a more correct view of the situation. However, Messrs. Greer & Hamilton, solicitors for Mrs. M'Naul (acting in perfect good faith), on the 29th July, 1899, wrote a letter to Mr. Stewart, the agent of Dr. Traill, stating that they were acting for Mrs. M'Naul, that the holding was held by her under the grant of 1852, subject to the yearly rent of £6 8*s*., and that the grant also contained the usual exceptions to the grantor of the minerals and game rights; that the headrent was payable to Dr. Traill, and they understood that he was the owner of the rent, and also of the exceptions. They pointed out that the headrent (according to the Land Commission procedure) must be redeemed, and added, "We shall be glad if you will let us know what sum Dr. Traill will accept for the purchase of the said headrent of £6 8*s*., the purchase-money to include the exceptions, which do not appear to be of any value." Mr. Stewart replied, and though we have not his reply, the purport is quite obvious, for on the 10th August, 1899, Messrs. Greer & Hamilton again wrote:—"Dear Sir—We understand you wish to know, before replying to our letter as to the price of the headrent and exceptions of holding, *if Dr. Traill can be compelled to sell.* Section 31 of the Land Act, 1896, empowers the Land Commission to order the redemption of all

(1) I. R. 6 C. L. 88.

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superior interests which are defined by sub-section 8 of the same section and include rent and exceptions. The purchase price may be fixed in one of three methods"; and then the methods are mentioned. A letter of November 6th is lost, but the reply of Messrs. Greer & Hamilton to Mr. Stewart is given in evidence:—"Dear Sir—We are in receipt of yours of the 6th inst. offering, on behalf of Dr. Traill, to accept thirty-three years' purchase of the headrent payable out of Drumcotton. Our client considers this much too high a price and cannot agree to it. We are authorized to offer Dr. Traill, without prejudice if not accepted, twenty-five years' purchase of the headrent Mrs. M'Naul pays out of Drumcotton; this price to include the exceptions which are only of nominal value; this is the usual price fixed by the Land Commission for well-secured headrents." There were further negotiations, but as a juror I find that they were negotiations and nothing more, negotiations without prejudice; that there was no concluded agreement of any sort, and that Dr. Traill preserved intact his position that compulsion must be applied to him, and that he was not in any sense a consenting party to the sale. In fact, it is clear that Dr. Traill took his stand upon the fee-farm grant, and insisted that Mrs. M'Naul and her advisers if they desired to compel him to carry out their wishes should proceed to do so in due course of law and pursuant to the statutes. This disposes of all questions raised as to consent, waiver, or acquiescence on the part of Dr. Traill. What followed is now a matter of legal history; it will be found written in *M'Naul's Estate* (1). The Court of Appeal came to the conclusion that *Billing* v. *Welch* (2) was a wrong decision, based upon an erroneous construction of an Act of Parliament, and that even its antiquity could not prevent the Court of Appeal from construing the statute according to its true interpretation. Accordingly the Court of Appeal on the 5th of February, 1902, made an order, and that order provides that so much of my order as upheld Mr. Commissioner Lynch's order on this particular point should stand discharged, and in lieu thereof "the Court doth declare that in fixing the amount of the redemption price regard is to be had to

(1) [1902] 1 I. R. 114. (2) I. R. 6 C. L. 88.

the existence in the said grant of the said covenant; and with the foregoing declaration it is ordered that this matter do stand remitted to the Irish Land Commission to proceed therein as to justice shall appertain."

In the course of their judgments the learned Lords Justices made some remarks which I think I ought to read. Lord Justice Fitz Gibbon says at page 125:—"It has not been disputed that the limited covenant restraining alienation without the lessor's consent to descendants of the grantee, by providing for the payment of an additional rent of £5 10*s.* 9*d.*, was a valid and subsisting provision in the lease. It was, in our opinion, not a covenant prohibiting alienation—on the contrary, it permitted alienation on the terms of paying the additional rent. It could not be omitted from the grant, save on commutation or by consent." At page 128 he says:—"But it does not follow that the grantor is now necessarily entitled to the full redemption price of the additional rent of £5 10*s.* 9*d.*, because that rent is not yet payable; and it is not proved that there has, as yet, been any alienation upon which the additional rent began to run. We must discharge the order appealed from in so far as it declares the covenant to be void. The Land Commission has jurisdiction to redeem the whole interest of the grantor under the grant, and the only relief to which the appellant is entitled is a declaration that, in fixing the amount of the redemption price, regard is to be had to the existence in the grant of the covenant referred to. The price will be enhanced by whatever may be justly ascertained to be 'the difference in marketable value' which the existence in the grant of the condition and covenant respecting the additional rent gives to the grantor. In other words, he is entitled to the price of the chance or prospect that, if the redemption did not take place, the £5 10*s.* 9*d.* would have become payable on some future alienation to some person other than a descendant of the grantee for the time being. It is not for us to indicate, and we have no means of estimating, what the amount of such enhancement may be. The case will be remitted to the Land Commission, with the foregoing declaration, to proceed thereon as to justice may appertain." I may point out that the learned Lord Justice says that the additional rent has not yet become payable, and that it is not proved that there has as

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yet been any alienation upon which the additional rent began to run. I do not overlook the passages which follow with reference to the mode in which the Lord Justice apparently thought that effect should be given to this covenant—passages which are decidedly more in favour of Mr. Harrison's contention on the main issue involved in this case than of the contention on the part of Mr. Ronan and Mr. Moore. But having regard to the whole scope of the judgment, I do not think that the Lord Justice meant or intended to bind the Land Commission by anything more than the actual declaration embodied in the order, that the covenant in the fee-farm grant was a good and valid covenant to which regard must be had. Lord Justice Walker at the foot of page 133 says:—"I think the covenant in question now is legal, and I am also of opinion, on the authorities, that it was open to the grantee to break this covenant on the terms of paying the fixed price of the additional rent of £5 10*s.* 9*d.* It follows that in fixing the redemption price regard must be had to it, but we cannot say more. The additional rent has never been claimed or enforced, and it is not for us to measure the extra value to be attributed to the redemption price by reason of the existence of the covenant." These observations also are (as regards the main issue) more in favour of Mr. Harrison's contention than of Mr. Ronan's, but I still think it was not intended to bind the Land Commission further or otherwise than the declaration expressly purported to do. Lastly, I refer to Lord Justice Holmes' judgment at page 138:—"Adopting these words and applying them to the present case, I am unable to hold that a covenant inserted in the fee-farm grant, pursuant to the mandate of the statute and for the enforcement of which special statutory provision is made, is void. Being a good covenant, regard must be had to it in fixing the redemption price of the rent; but to what extent such price will be affected thereby can only be determined by the Land Commission. This may involve some difficulty; for it must be remembered that although up to the present time the event upon which the increased rent becomes payable has not yet happened, its happening in the future can hardly be described as a mere chance, inasmuch as the right to redemption is dependent upon a transfer of the lands."

Now, if the position of the parties had not been changed in any respect since the decision of the Court of Appeal my difficulties would, I apprehend, have been greater than they are at present. For as a Judge of law and fact I hold that, up to the date of the order of the Court of Appeal, nothing had occurred to entitle Dr. Traill to claim the additional rent as an existing rent payable to him under the fee-farm grant; but, on the other hand, as the sale to M'Fall could only be completed by a transfer of the lands carried out by, or at the instance of, Mrs. M'Naul, I fail to see any answer to the concluding observations of Lord Justice Holmes. The position of the parties has, however, in my judgment been changed, for the vendor with her eyes open has, it seems to me, performed the act which made the additional rent payable. At her instance and request a vesting order was executed on the 11th June, 1902. I have no longer to deal with a possibility or a mere chance, because, in my opinion, the event on which the increased rent became payable ceased to be a chance and became a certainty when the vesting order was executed, and Mrs. Cecilia M'Naul, without the consent of Dr. Traill, caused the fee-simple of the holding to be vested by the Land Commission in her tenant M'Fall. The transfer of the lands by means of a vesting order was as much the voluntary act of Mrs. M'Naul as would have been a conveyance by her, and, in my judgment, operated as an alienation within the meaning of the covenant. Mr. Harrison in his able argument says the operation of the vesting order was such as to vest the fee-simple in the tenant, and at the same moment of time to sweep away the rights of the landlord in respect of the additional rent. I cannot concur in this argument having regard to the provisions of the Act of 1896, to which I have already referred. "Covenants, conditions, or agreements contained in any fee-farm grant" are superior interests, and when the holding is vested such superior interests or the value thereof become a lien upon, and must be redeemed or satisfied out of, the purchase-money (section 31). Still more emphatic are the words of the 33rd section, sub-sect. (1). "For the purpose of the distribution of, or other dealing with, an advance, sections 15 and 16 of the Land Law (Ireland) Act, 1887, and any other unrepealed enactment in the Land Purchase Acts, or this Act, relating to the

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redemption or apportionment of charges on holdings, or otherwise to the distribution of the purchase-money of a holding, shall apply *as if the money were the holding.*" Applying those provisions to the present case, it seems to me that to speak of this covenant as having been swept away is quite erroneous. Mrs. M'Naul had in the most effective manner alienated the lands without the requisite consent. This, as Lord Justice Walker pointed out, she was entitled to do "on the terms of paying the fixed price of the additional rent of £5 10*s.* 9*d.*" Dr. Traill, no doubt, ceased to have any right under the covenant against the purchaser or against the lands; the order vested the lands in the purchaser in fee-simple discharged from all superior interests; but by the very operation of the vesting order, and on the true construction of the Act of Parliament, the rights of Dr. Traill under the covenant became attached to the purchase-money of the holding *as if the money were the holding.* So I hold.

After the vesting order was executed notice of an application was served for the 17th of June, 1902, before Mr. Commissioner Lynch, for an order that the price to be paid in respect of the perpetual fee-farm rent of £6 8*s.* and all other superior interests, except the right of fishing, should be determined by the Land Commission, and for the determination of the same accordingly; and in the alternative that such directions might be given and orders made for the determination of the price by the Land Commission, or by arbitration, or otherwise, as Mr. Commissioner Lynch might be pleased to make. Mr. Commissioner Lynch was pleased to make an order which I consider was a very proper order to make. He referred the matter to one of our Examiners, Mr. Dames, whom everybody knows as an able and accomplished lawyer, and he, in presence of both parties, proceeded to settle a draft submission to arbitration. He inserted in the draft the following statement by way of recital:—"And whereas it is alleged by the said Anthony Traill that the said John M'Fall is not a child or grandchild of the grantee in the said recited indenture." He was perfectly right in my opinion in putting it in that form, because it was not yet admitted that M'Fall was not a child or grandchild. He also inserted the following recital:—"And whereas upon the execution of the said vesting

order the said additional rent of £5 10*s.* 9*d.* became payable." He put a note as follows in the fold of the submission :—"Mr. Greer, for vendor, objects to the recitals in the within draft submission (*a*) of the vesting order, (*b*) of the statement with regard to M'Fall not being a child or grandchild of the original grantee, and (*c*) of the additional rent having become payable." A correspondence followed, and the matter was sent back to Mr. Commissioner Lynch, and ultimately the parties came to the conclusion to refer the matter to me. A minute was drawn up to the effect that both the vendor and Dr. Traill agreed that I should settle the terms of reference to the arbitrators and all legal questions involved, including the question whether the additional rent has become payable, and if so, from what date, the action in the King's Bench Division to be discontinued, and the costs thereof to be in the discretion of myself, subject to the proviso that any order made by me should be subject to appeal in the usual way. Now as regards the terms of reference to the arbitrators, I adopt the terms of reference as settled by Mr. Dames; they completely carry out my views of the situation, with one exception. It is now admitted, as it was not admitted before Mr. Dames, that M'Fall is not "a child or grandchild" within the meaning of the covenant, and, therefore, that portion of the matter must be set right in the submission. With regard to the main question involved, *i.e.* whether the additional rent has become payable, I have already answered that in the affirmative. With regard to the question as to the date upon which the first payment accrued due, the covenant provides that from and after the time of alienation (which I have decided to be the time of the vesting order) the rent is to accrue, and is to be paid by equal half-yearly payments, the first of which is to be made on such 1st of May or 1st of November as shall happen next after the time of such alienation or demise. Accordingly, as the vesting order is dated 11th June, 1902, the first half-yearly payment of the additional rent became due and payable upon the 1st of November, 1902. With reference to all questions of consent, waiver, or acquiescence, I have already decided those in favour of Dr. Traill. It only remains to deal with the question of costs.

First, as regards the action brought by Dr. Traill in the

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King's Bench Division against Mrs. M'Naul. According to my view it was wholly unsustainable so far as regards the claim made in respect of the additional rent. On the pleadings as they stand I hold that the defendant was entitled to succeed. She brought into Court a sum sufficient to cover the amount due to the plaintiff in respect of arrears of the fee-farm rent of £6 8*s*. She denied that any portion of the additional rent sued for was recoverable. According to my decision she was right in this, inasmuch as the last gale of the additional rent sued for was alleged to have become payable on the 1st of May, 1902. I have decided that the first gale of the additional rent only became payable on the 1st of November, 1902. I must therefore hold that Mrs. M'Naul is entitled to the general costs of the action. On the other hand, Dr. Traill has succeeded upon the main question argued before me, and he is entitled to the general costs of the present proceedings. His contention as regards the main issue before the Examiner and before me was, in my judgment, correct.

At the request of counsel the question of costs was further argued, and his Lordship decided that the order of the Court should be as follows :—

> "AND the Court doth declare Dr. Traill entitled to three-fourths of his costs (with counsel) of the said application to Mr. Commissioner Lynch on the 17th June, 1902, and all proceedings thereunder, including this hearing and order, as part of his costs of the redemption of the said rent, additional rent, and superior interests; and doth declare the vendor entitled to three-fourths of her costs incurred in the said action of *Traill* v. *M'Naul*, in the King's Bench Division, to be paid to her by Dr. Traill."

Solicitors for the vendor: *Greer & Hamilton.*
Solicitors for Dr. Traill: *Crookshank, Leech, & Davies.*

W. C. S.

HUSSEY *v.* DOMVILE (No. 2) (1).

Appeal.
1902.
May 12, 13.

Landlord and tenant—Lease for three lives—Covenant by landlord to renew within a limited period on tenant nominating a new life within a specified time from dropping of each life successively—Right to demand renewal on the death of the last surviving life, when new lives were not nominated on deaths of the first lives falling.

A lease for three lives contained a covenant by the lessor that he would, upon the dropping of any of the lives which should first happen within a specified term, on the payment of a fine by the lessee, and on the nomination by the lessee of a new life within six months after the death of the person so happening first to die, add such new life in lieu of the person so happening first to die, and that he would, in like manner from time to time successively upon the failure of any and every other life in the said lease nominated, and thereafter to be successively nominated, on the like nomination and like payment of a fine, successively thereafter during the same term, add the life or lives so successively nominated in the place and stead of each and every of the several persons so successively happening to die as aforesaid:—

Held (by the Court of Appeal), that upon the true construction of this covenant, it prescribed as necessary for obtaining a renewal the condition that the lessee should renew regularly within six months from the fall of each life, so as always to maintain (except during such six months) the full number of three lives, and that if he failed so to renew within six months from the dropping of any life he lost his right of renewal.

APPEAL by the defendants from the judgment of the Right Hon. the Vice-Chancellor of Ireland declaring the plaintiffs entitled to a renewal of a lease by adding a new life to the term thereof in lieu of that of Her late Majesty Queen Victoria.

The facts are stated in the report of the former action between the same parties [1900] 1 I. R. 417. The terms of the lease of 1st August, 1823, and of the deed of 29th March, 1842, extending the period during which renewal could be claimed are there sufficiently set forth, except that for the purposes of the present case the covenant for renewal in the deed of 29th March, 1842, must be set forth verbatim. It was as follows:—

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

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"Now these presents witness that in pursuance and execution of the said agreement they the said Sir Compton Domvile and Compton Charles Domvile do hereby each of them for himself severally and respectively and for his several and respective heirs and assigns covenant promise grant and agree to and with the said William Sherrard his heirs and assigns in manner following that is to say that upon the death of any of the aforesaid lives of the said Adolphus Frederick Duke of Cambridge David Henry Sherrard and William Nassau Sherrard or any of them which shall first happen within the term or time of seventy years to be computed from the 29th day of March 1842 and he the said William Sherrard his heirs and assigns first paying unto the said Sir Compton Domvile or his assigns during his life and after his decease unto the said Compton Charles Domvile his heirs or assigns the sum of 4*s.* 7½*d.* sterling over and above the said annual rent and receiver's fees and upon the nomination by the said William Sherrard his heirs or assigns within six months next after the death of such person so happening first to die as aforesaid of any other life to be at the request of the said William Sherrard his heirs or assigns put and inserted in the place and stead of the person so happening first to die as aforesaid that then he the said Sir Compton Domvile and his assigns and he the said Compton Charles Domvile his heirs and assigns shall and will at any time thereafter during the said term of seventy years to be computed as last aforesaid on the demand of him the said William Sherrard his heirs or assigns add and insert to the time and term of the said recited lease the life of such person so nominated in the place and stead of the person so happening first to die as aforesaid which life so added and inserted shall be indorsed on the presents or shall be written in a deed label or parchment to be affixed to these presents for that purpose or in a separate deed or writing declaring the life so failing and the life so added in lieu thereof and the three lives in being during which the said estate shall be then to continue and in the like manner from time to time successively hereafter during the said term of seventy years commencing from the said 29th day of March 1842 as aforesaid upon the failure of any and every other life in the said recited lease nominated and hereafter to be

successively nominated as aforesaid and upon the like nomination of any other life successively in lieu of every several life so failing as aforesaid that then he the said Sir Compton Domvile and his assigns and he the said Compton Charles Domvile his heirs and assigns upon the demand of him the said William Sherrard his heirs and assigns and upon the like payment made of 4*s.* 7½*d.* sterling for the fall of every such life over and above the said rent and receiver's fees then due at the time of such demand to be made as aforesaid shall and will successively hereafter during the term aforesaid add and insert to the time and term of this demise the several life or lives of the several person or persons so successively nominated in the place and stead of each and every of the several person or persons so successively happening to die as aforesaid which several lives so to be added and inserted successively shall be indorsed on these presents or written in deeds labels or parchments to be affixed hereunto or in separate deeds or writings declaring the life or lives so failing and the life or lives so added in lieu of the life or lives so failing and the three lives in being during which the said estate shall be then to continue as is before mentioned."

The renewal of 2nd January, 1852, by which the life of Queen Victoria was added to the term, recited that the lessee had "applied to Sir Compton Domvile to grant her a renewal of the said lease by inserting the life" of Her Majesty, "and hath paid unto the said Sir Compton Domvile the fine for renewal," and it witnessed that "in consideration of the fine the receipt whereof he the said Sir Compton Domvile doth hereby acknowledge," the renewal was granted. On this renewal there was a receipt indorsed, "Received from the within named Maria Sherrard the sum of 4*s.* 7*d.*, being the renewal fine in the within deed mentioned to be paid the day and year first within written." It is important to recollect that this deed (as already stated, [1900] 1 I. R. 420), was not executed by Compton Charles Domvile.

After the decision of the Court of Appeal in the former action the plaintiffs continued in possession of the premises demised by the lease. Queen Victoria died on 22nd January, 1901. On 19th March 1901, the plaintiffs nominated to the defendants, as owners of the reversion, a new life in her place

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and tendered the fine. The defendants refused to renew. The plaintiffs then brought an action claiming a declaration that they were entitled to renewal of the lease. The defendants resisted this claim, contending that the plaintiffs, having forfeited their right to nominate lives in place of the late William Nassau Sherrard and Robert Richard Warren, it had become impossible for the plaintiffs to nominate another life to be added to the term, in accordance with the covenant and conditions in the said lease contained; that the life of Her late Majesty Queen Victoria not having been validly nominated or added to the term of the said lease, the plaintiffs were not now entitled to nominate a life in the place of Her late Majesty; and that the lives for which the said lease was granted, or which had since been duly added thereto, having died, and there being now no lives in existence for which the demised lands were held, the term by the said indenture of lease created had ceased, and the said lease and all the lessee's rights thereunder had determined. No evidence as to the circumstances attending the nomination of the Queen except the statements in the renewal was given at the trial. The Vice-Chancellor decided that the plaintiffs were entitled to obtain a renewal of the lease. From this decision the present appeal was taken.

Ronan, K.C., O'Connor, K.C., and *Orpen*, for the appellants.

Serjeant Campion, K.C., Matheson, K.C., and *Garrett Walker*, for the respondents.

The arguments appear sufficiently from the judgments.

In addition to the authorities cited in the previous argument, the appellants cited *Maxwell* v. *Ward* (1).

May 13.

LORD ASHBOURNE, C.:—

In this case the Court is called upon to construe a covenant for renewal contained in a lease made in 1823, and also to decide whether a renewal of the lease granted in the year 1852 by the then tenant for life of the reversion was validly granted so as to bind the present owner of the reversion.

By the lease Sir Compton Domvile, in consideration of a rent of £405 per annum, demised the lands of Kilbogget, containing almost 200 acres, to William Sherrard, his heirs and assigns, for the lives and life of His Royal Highness Adolphus Frederick

(1) 1 M'Clell. 458.

Duke of Cambridge, David Henry Sherrard, and William Nassau Sherrard, with a covenant to renew the lease by adding new lives thereto within a term of seventy years from 1st May, 1823, on compliance by the lessee with certain conditions thereby imposed.

In the year 1830 the rent of £405 was reduced to £323 1*s.* 7*d.* by articles of agreement indorsed on the lease. By another deed made in 1842 the privilege of renewal of this lease was enlarged by extending the term during which it could be claimed so as to make it run for seventy years from the 29th March, 1842, thus giving a substantial addition to the original lease. This deed also repeats the covenant for renewal contained in the original lease.

The question of construction which we have to decide is, whether the language of this covenant prescribes as necessary for obtaining a renewal the condition that the lessee must renew regularly within six months from the fall of each life, so as always to maintain (except during such six months) the full number of three lives, and whether if he fails to perform this condition the covenant entitled him to claim a renewal.

The next document which calls for attention is the deed of 1852. The Duke of Cambridge having died in 1850, the deed of 1852 purported to carry out the intention of the covenant, and to nominate the life of Her late Majesty Queen Victoria in place of the Duke of Cambridge by granting a renewal of the lease for the lives and life of David Henry Sherrard, William Nassau Sherrard, and Queen Victoria. David Sherrard died on 7th May, 1868, and on 1st April, 1871, the life of the late Judge Warren was nominated in his place. William N. Sherrard died on 22nd February, 1879; no life was nominated in his place till 8th February, 1898. There is no question that in both these latter cases the new lives were nominated long after the lapse of the six months allowed by the express terms of the lease, and on the claim made to renew the lease in 1898 the question was raised by those representing the estate, whether the nomination of Judge Warren was regular, and also as to whether they were bound to accept the nomination of and renew for a new life in lieu of William N. Sherrard after the time that elapsed since his death. That was the occasion of the first litigation here, the plaintiffs having brought proceedings on the death of Judge Warren in 1897 to compel the

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defendants to renew by adding two lives to the term, one in lieu of William N. Sherrard and one in lieu of Judge Warren. The Vice-Chancellor acceded to the plaintiffs' contention; the defendants appealed, and in this Court nearly all the topics and authorities which we have heard on the present occasion were discussed at length, not in reference to Her late Majesty's life, but in reference to the claim to add the two new lives which I have mentioned. On that occasion there was an elaborate argument upon the Tenantry Act, the plaintiffs contending that the equity thereby declared in favour of lessees for lives renewable for ever extended also to the case of lessees holding under leases with covenants for renewal to be executed within a limited term. That argument was rejected, and the Court pointed out that this being a lease with a rigorously marked out term within which the renewals were to be made, no equity could be urged as a ground for departing from the exact terms of the covenant. It was also pointed out that the property being in strict settlement, the acquiescence and assent on the part of the tenant for life could not bind the persons entitled in remainder. That decision covers a great many of the topics discussed here now, and of course we cannot allow any doubt to be thrown on it. But it expressly left open the question as to the validity of the renewal for Queen Victoria's life, and also the question as to whether the right to renewal continued unless there were two lives in existence when the new life was nominated.

Under these circumstances, on the death of Queen Victoria on 22nd January, 1901, the two questions left undecided in the former action became ripe for decision. On the 19th March the plaintiffs, being on the alert, applied to the defendants as the owners of the reversion to add to the lease a new life instead of that of the late Queen. The defendants refused.

Then this suit was brought claiming a declaration that the plaintiffs are entitled to a renewal of the lease. The matter was heard again before the Vice-Chancellor, and he decided in favour of the plaintiffs. From that decision the defendants have appealed.

The first point is one of fact, whether the life of Queen Victoria was nominated in time correctly within the terms of the lease. The second point is one of law, whether, assuming the life

of the Queen to have been correctly added to the tenure, the right of the plaintiffs to obtain a renewal still survives, having regard to their having failed to keep up the three lives by renewing in due time after the deaths of David H. Sherrard and William N. Sherrard—in other words, whether the lease which has ceased to be a lease for three lives can be renewed so as to be a lease for one life.

With reference to the question of fact, I do not desire to rest my judgment upon any opinion which I have formed regarding it. But I should not like to convey that I was impressed with the argument of the plaintiffs, because excepting what appears on the face of the deed there is nothing to show that the nomination of the life was made in due time. However, it may be possible that though effect was not given to the nomination till 1852, that the life of the Queen was nominated within six months after the death of the Duke of Cambridge in 1850. Nothing can be inferred from the language of the deed as to the precise date of the nomination. The recital that the lessee "hath applied" for a renewal by inserting the life of Her Majesty might refer to any time prior the date of the deed.

By the deed the matter being thus left somewhat at large, I should not be disposed to preclude the plaintiffs from laying all reliance that they can on the fact that the parties to the deed treated the nomination as regular. But I can see no reason for latitude in reference to the payment of the fine, because in this case we have the language of the parties expressed in the most solemn way known to the law saying that the fine was paid at the date of the deed. Without contradicting the express terms of their own deed, they cannot argue that they paid the fine within the time required by the covenant.

I should therefore find enormous difficulty in saying that the plaintiffs' predecessors did satisfy the conditions of the covenant. However, it is not necessary to give any formal decision on that point, because on the second point our decision must be against the plaintiffs.

The second point depends upon the construction of the covenant in the deed of 1823, repeated in the deed of 1842, the language of which is as clear, precise, and significant as well can be. It is not an ordinary covenant for renewal. It is a covenant giving

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the privilege of renewal within a limit of time clearly marked, and subject to the performance of certain precisely stated conditions. The covenant is that "upon the death of any of the *cestui que vies* named in the lease . . . which shall first happen within the term of seventy years . . . and the lessee first paying to the lessor" the prescribed fine, and on the nomination by the lessor within six months next after the death of such person so happening first to die of another life to be inserted in the place of the person so happening first to die, the lessor shall add and insert to the time and term of the said lease the life of such person so nominated, "which life so added and inserted shall be indorsed on these presents or shall be written in a deed, label, or parchment to be affixed to these presents for that purpose, or in a separate deed or writing, declaring the life so failing and the life so added in lieu thereof and the three lives in being during which the said estate shall be then to continue." So far the covenant has only dealt with the case of the first life to fall, and it is admitted that in its case the covenant must be construed as the appellants contend. The question is, are the provisions as to renewals after the first less stringent. The covenant continues "and *in like manner* from time to time successively hereafter during the said term of seventy years" upon the failure of any and every other life in the said lease mentioned "and hereafter to be successively nominated as aforesaid, and *upon the like nomination* of any other life successively in lieu of every several life so failing as aforesaid" the lessor upon the demand of the lessee, and "*upon the like payment made*" of the fine at the time of such demand, "shall successively hereafter during the term aforesaid add and insert to the time and term of his demise the several life or lives of the several person or persons *so successively nominated* in the place and stead of each and every of the several person or persons so *successively happening to die* as aforesaid, which several lives so to be added and inserted successively shall be indorsed on these presents or written in deeds, labels, or parchments to be affixed hereunto or in separate deeds or writings declaring the life or lives so failing, and the life or lives so added in lieu of the life or lives so failing *and the three lives in being during which the said estate shall be then to continue.*"

I can see no reason why we should divide this covenant into two parts, the first prescribing the terms on which the first renewal was to be granted and the latter prescribing different terms as applicable to subsequent renewals. It would require very express language to show that the parties intended different conditions to attach to the first and to the subsequent renewals. The language used here negatives any such intention. The covenant first points out the mode in which the first renewal is to be obtained: the clause directing the mode of dealing in the case of subsequent renewals—so far from leading the reader to expect anything different—begins with the words "*and in like manner.*" Further, the renewal is to be made "*upon the like* nomination" and "upon *the like* payment" of the fine. The life or lives are to be "successively" nominated in the place and stead of the several person or persons so *successively* happening to die; and, lastly, the life when added is to be written in a deed declaring, amongst other things, "*the three lives in being* during which the said estate shall be then to continue." In my opinion the language of the covenant is so precise and clear that it leaves no room for doubting that its true construction is, that if the lessee allows the period of six months to elapse from the death of any *cestui que vie* without duly nominating a fresh life, his right of renewal is absolutely gone.

I can see very distinct reasons for the policy of framing the covenant in language so precise. The rent reserved was a substantial rent—especially at the time the lease was made. The district was undeveloped in 1823. The parties knew that lands near Dublin might vary in value as the city grew or as fashion changed. The subsequent abatement of the rent and extension of the term within which the renewals could be obtained appear to show that the neighbourhood did not improve in value as rapidly as was at first expected. I can understand the lessor being careful to frame the covenant so as to compel the lessee always to keep three lives in being and not to give him the option of electing if the value of the lands went down to retain the less certain tenure of a single life, with the power to renew on its failure, if the value should again rise.

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Of the mass of authorities cited, all except *Maxwell* v. *Ward* (1) were before us on the former occasion. I see nothing in any of these cases to qualify the necessity of construing this covenant strictly according to its terms, and our previous decision has a substantial bearing on the argument addressed to us on the part of the respondents.

I am of opinion the decision of the Vice-Chancellor should be reversed.

FITZ GIBBON, L. J.:—

Two questions have been argued on this appeal—one of fact, the other of construction. The question of fact is whether the name of Queen Victoria was added to the term of the lease in the prescribed manner. The question of construction is whether the covenant in the lease requires that the lessee shall—to use a convenient metaphor—always keep three candles alight; in other words, whether the lessee, in order to keep alive his right to future renewals, must within six months from the death of each and every life set up the full number of three subsisting lives during which the lease is to run. If the question of fact be determined in the negative, the case is governed by our previous decision. It is only on the assumption that the first question is to be answered in the affirmative that it becomes necessary to answer the second question.

If the *onus* of proving the fact lies upon the lessee, it has not been discharged. But, under the circumstances of this case, I think that a presumption against the landlords arises which throws it on them to show that the Queen was not duly nominated. They have themselves acted upon the nomination, and have treated the life of the Queen as added to the term, though in the former action they guarded themselves from an express admission to that effect. After the dealings which took place, and the acceptance of rent, I decline now to lay the burden of proving the regularity and validity of the nomination *de novo* upon the tenant, and I consider the evidence upon the question of fact to see whether it proves that the nomination was not good. The act of nominating the life is to be done by the tenant, and is a condition precedent to

(1) M'Clell. 464.

the enlargement of the term by the landlord. Under the terms of the lease the landlord for the time being, being a tenant for life, could not enlarge the tenant's estate, unless both the nomination of a life and the payment of a fine had been previously made by the tenant.

The landlord for the time being was entitled to take the fine for his own use, and the person entitled to the money could, no doubt, waive or release its payment. If the nomination was in time, but there was no evidence that the fine was paid, or even if it was proved not to have been paid, I might hold that it was waived or released. But here the document enlarging the term purports to be executed upon payment—not waiver—of the fine, and a receipt for the fine is annexed, and the preponderance of evidence is that there was an actual payment contemporaneous with the execution of the deed. Payment of the fine being, as I hold it to be, an integral part of the transaction, the payment being late is just as fatal to the validity of the renewal as the nomination being late. I do not treat the receipt as estopping the tenants upon the date of the payment, but there is no evidence the other way, and as a juror I should hold myself bound to answer the question of fact in the negative, and against the tenant.

However, I do not rest my opinion on that ground alone, and assuming that the nomination was made, and that the fine was paid, in time—or at least that we are not bound to find the contrary—I can find no answer to the contention that to preserve the right of renewal the tenant must keep three lives always current, except during the period not exceeding six months immediately following the death of each *cestui que vie*, allowed for replacing each life that falls.

I cannot read the first clause of the covenant by itself; it deals with the first renewal only, but the whole covenant must be read together, and it deals with every case. In both clauses there is a repetition of the words "successively" "each" and "any," which cannot be immediately satisfied unless each single life that drops is to be replaced by another nominated within six months. The only place where the plural comes in is in the phrase "shall add and insert the several life or *lives* of the several person or *persons*," and this phrase cannot help the respondents, for its

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meaning is rendered plain by the next words "so *successively* nominated," clearly intimating that the "lives" of the second "persons" are to be added one by one. But each clause closes with the same words, directing that the deed of renewal is to specify "*the three lives in being during which the estate shall be then to continue*," and, in my opinion, the affirmative answer to the second question is given by the very words of the instrument.

There are substantial interests which this form of covenant was probably intended to secure. The effect of the words can not depend on the amount of the fine. If the fine were large, a large sum would be payable to the landlord within six months after each life fell. If the tenant could economise, and pay no fine until the last *cestui que vie* died, he might then renew, and continue to do so up to the end of the term of years for a single life, and thereby effect a saving of money probably amounting at compound interest to a large amount at comparatively little additional risk of shortening his tenure, because the duration of a single life and of the survivor of three lives, named within a fixed term, might be much the same if the tenant could name a "good life" shortly before the conclusion of the term of years.

Furthermore, there is nothing in the lease to indicate that this privilege given to the tenant was contemplated as necessarily of pecuniary value to him. It was optional. The land—looking at the map—was an agricultural holding when demised. The rent was heavy. The increase of value is chiefly due to changes in the surroundings. If it had remained agricultural land the tenant might not have named a life at all, and perhaps might have come in under the Land Acts. It cannot have been intended that when two lives dropped the tenant might make up his mind not to renew, and leave the landlord without his fines perhaps for more than half a century, and then, towards the end of the term, on the land becoming valuable, make himself tenant for one young life paying only a single fine.

Therefore, I cannot treat this as anything but a privilege which the tenant had, subject to the condition of exercising it in the prescribed manner, and within the prescribed time. He has not done so. The landlord has done nothing to determine the tenancy; by taking rent he has treated the tenant as at least a

tenant from year to year. But when the tenant took steps to compel a renewal the landlord challenged his right to it, and it seems to me that the case is ruled by our former decision.

WALKER, L. J.:—

I should be very glad if I could see my way to concur in the decision of the Vice-Chancellor, but I am unable to do so.

We are obliged by our decision in the last case to leave out of sight all equity founded on the Tenantry Act or derived from analogy to it, and find the rights of the parties in the construction of the covenant for renewal.

It is the covenant of the lessor only, but it gives the lessee a right which he can exercise at his option only on the terms in which it is given, and if the terms are not complied with the lease stands unrenewed.

The original lease of 1823 demises the lands in question, which contain 199A. 3R. 26P., to William Sherrard, his heirs and assigns, for the lives and life of the Duke of Cambridge, David Henry Sherrard, and William Nassau Sherrard, and the survivors and survivor of them, renewable during a term of seventy years, which would expire on the 1st May, 1893. The lease reserves the substantial rent of £405, but that rent was on the 22nd February, 1830, reduced to £323 1*s.* 7*d.*, and on the 29th March, 1842, the then tenant for life and remainderman in fee extended the term during which renewals might be obtained by making the term of seventy years run from the 29th March, 1842, and that deed contains a covenant for renewal, upon the conditions of which the rights of the parties depend.

The consideration for these favours to the lessee were his expenditure in improvements and building on the lands, and it is that which makes the lands valuable, for if the letting be regarded as an agricultural take in 1830 and 1842, the rent of £405 would have been a very high one.

The Duke of Cambridge died on the 8th July, 1850. David Henry Sherrard died on the 7th May, 1868, and William Nassau Sherrard on the 22nd February, 1879.

Now it is not disputed that in the case of the death of the first

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life the new life must be nominated within six months. It was contended that the payment of the fine need not be within six months if it was paid before a renewal was executed. A renewal for the life of Her late Majesty with two of the subsisting lives was executed by the tenant for life only on the 22nd January, 1852, and if the life was not nominated till then, it is not disputed that such nomination was bad. There is no evidence beyond what appears in the renewal itself as to the date of nomination or payment of fine. The renewal recites that the lessee "hath applied unto the said Sir Compton Domvile to grant her a renewal of said lease by inserting the life" of Her Majesty, and "hath paid unto the said Sir Compton Domvile the fine for renewal," and it witnesses that in consideration of the fine "the receipt whereof the said Sir Compton Domvile doth hereby acknowledge" the renewal is granted.

There is a receipt clause indorsed, "Received from the within-named Maria Sherrard the sum of 4*s.* 7*d.*, being the renewal fine in the within deed mentioned to be paid the day and year first within written." It is contended that all that is consistent with a nomination within six months—and that is not impossible, as the nomination must always precede the deed—and (it was also said) even as to the fine that payment within six months should be presumed. I could not in the case of the fine presume that, and in my opinion payment of the fine was a condition precedent.

These contentions of the plaintiff are difficult to sustain, but then it is added that the persons claiming under the owner in fee from 1879 have taken no steps to treat the renewal as invalid, and that at this distance of time the doctrine "*omnia praesumuntur rite acta*" should apply, and at all events raise the necessary presumption. I am far from saying that I am prepared to decide this branch of the case in favour of the plaintiffs; but as I think the plaintiffs clearly fail on the construction of the covenant, it is not necessary for me to express any concluded opinion on the first branch, which really seems to resolve itself into a question of *onus probandi*.

As to the construction of the covenant, I think it is impossible to treat the covenant as two independent covenants. I think the second part of it must be read as carrying into that part the con-

struction and language of the other part. The necessary admission that the plaintiff must fail if the case depended on the death of a first life is a concession which is fatal to the argument in relation to the dropping of the second and third lives. When the first life drops and a new one is nominated, the new life added is to be indorsed or written in a deed "declaring the life so failing and the life so added in lieu thereof and the three lives in being during which the said estate shall be then to continue." So far as to the dropping of the first life the case is clear; the three lives must appear together—the three candles must be burning.

The facts are that we must assume that there was no nomination or attempt at renewal made in the case of the second and third lives in 1868 and 1879, but it is still said the lease is to go on, notwithstanding that, as a one-life lease when the Queen should die. I think the language of the covenant and the reason of the thing are against this contention; *a priori* the result ought to be the same in the case of the three lives. The covenant proceeds: "And in the like manner from time to time successively hereafter during the said term of seventy years upon the failure of any and every other life in the said recited lease nominated and hereafter to be successively nominated as aforesaid, and upon the like nomination of any other life successively in lieu of every several life so failing, the lessors upon the demand of the lessee and upon the like payment made of 4*s.* 7*d.* sterling for the fall of every such life . . . shall and will successively hereafter during the term aforesaid add and insert to the time and term of this demise the several life or lives of the several person or persons so successively nominated in the place and stead of each and every of the several person or persons so successively happening to die as aforesaid." It is said that the words in the "like manner" do not mean the same course shall follow, and that the word "successively" only means "from time to time," but the point is made clear by the last words, which provide that in every case, including the second and third failure, there is to be a writing declaring the life or lives so failing and the life or lives so added in lieu of the life or lives so failing and the three lives in being during which the said estate shall be then to continue, *i.e.* the three lives are in each successive case to be expressly named in

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the document evidencing the renewal as lives continuing and wearing out all together.

There is substance, too, in the case, because a fine is to be paid which would be lost if the lease were to go on as a one-life lease, and the amount of the fine cannot determine the construction.

I think, too, there is force in the argument that it was intended so far as practicable to keep up a lease having a legal existence to which covenants at law would be annexed; all this would be lost if at the option of the lessee he could convert the lease into a single-life one.

As to the authorities cited, the case no doubt must turn on the language of the particular covenant; but the covenant in *Maxwell* v. *Ward* (1) is very like, though it is not identical with, the present one, and I do not think that case loses any of its weight by the Chief Baron intimating his willingness to send on the case to a Court of law. The same case is more fully reported on the hearing of the injunction in 11 Price 13, and the covenant is there set out *in haec verba*. Richards, C.B., continued the injunction to the hearing. The moment that injunction came to an end the defendant was entitled at law. I think the plaintiff must still have been in possession by reason of the injunction at that hearing, and the bill was retained for a year, so that if no action was brought before the 23rd June, 1825, the injunction dropped. It is obvious no action was brought, and the defendant the landlord fully succeeded. The reason the Chief Baron said it must not be ejectment was, I think, because such an action might not necessarily determine the construction of the covenant.

In *Rubery* v. *Jervoise* (2) much weight was attached to the loss of the fine which would ensue on the tenant's construction of the covenant, and the amount of the fine cannot determine the construction.

Upon the whole, I think that the same result must follow as in our former decision of *Hussey* v. *Domvile* (3), and, speaking for myself, I always felt that once the case was to be decided on the form of the covenant free from the effect of the Tenantry Act, or any analogous equity, the case of the first, second, and third lives must stand or fall together.

(1) M'Clell. 464. (2) 1 T. R. 229. (3) [1900] 1 I. R. 417.

HOLMES, L.J.:—

If the late Queen was not nominated as a life of the lease within six months after the death of the Duke of Cambridge, the case is governed by our decision relating to the subsequent nomination of the late Judge Warren in the last action of *Hussey* v. *Domvile* (1). On that occasion, as on this, there were the same arguments of confirmation and acquiescence; and having disregarded them there, we cannot accept them now. We know nothing of the circumstances of the nomination of the Queen save what appears in the renewal of 2nd January, 1852, eighteen months after the death of her uncle. It is probable that Her Majesty's name was furnished to the lessor before the date of that instrument; and perhaps we ought to presume that this happened within the six months. But the fine is stated to have been paid on the execution of the deed; and I do not see how we can presume that it had been already paid. Therefore, on this point, I should be obliged to hold that in January, 1852, the tenant's right to renew was forfeited, and that it could not be restored by a tenant for life of the reversion. I prefer, however, to decide the case upon the terms of the covenant for renewal which seem to me to require that there should be three lives of the lease in being at the end of six months after the death of every life. If that period passes without the nomination of a new life in the room of the deceased, the right of renewal is gone. It is not my duty to explain why this was the contract. It is enough if I find it is the contract. It is admitted that this would be so on the death of the first to die of the lives originally named. The first part of the covenant makes this clear; but the second clause of it relating to the subsequent fall of lives is scarcely less distinct. Both clauses end with the same provision that the indorsement or separate writing declaring the newly added life is also to declare "the three lives in being during which the said estate shall be then to continue."

These words, in my opinion, leave no room for doubt.

Solicitors for the plaintiffs: *Dix & Son.*
Solicitor for the defendants: *Thomas Falls.*

G. Y. D.

(1) [1900] 1 I. R. 417.

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June 19, 20. July 2, 3, 15.

Appeal. Nov. 24, 25, 26, 27. 1903. Jan. 30.

O'BRIEN *v.* MITCHELSTOWN LOAN FUND SOCIETY.

(1901. No. 585.)

Loan Fund Society—Liability of trustees—Neglect of duty—Omission—False accounts and balance-sheets—Dishonesty of clerk—Loan Fund Society (Ireland) Act (6 & 7 Vict. c. 91)—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

In 1886 a Loan Fund Society was formed at M. in the county of Cork, under the provisions of the Act 6 & 7 Vict. c. 91, with the object of raising money by debentures and by receiving deposits for the purpose of granting loans to the industrial classes in the district. Under the Act, and the rules of the Society framed under it, the business of the Society was to be conducted by a treasurer, trustees, and a committee of management; the property and money were vested in the trustees, and the treasurer had the management of the funds and accounts, and also had charge of the books. The committee, of whom three should form a quorum, elected the trustees, treasurer, and clerk; they were to meet weekly to decide on applications by borrowers for loans, which were to be made on a prescribed form, and two solvent sureties were required for each loan. The note for the loan was given in the name of the treasurer, and was repayable by weekly or monthly instalments. An abstract of the accounts of the Society for each year was to be made out in a prescribed form, with a statement of the property and effects of the Society, and of its debts and liabilities, and sent to the Loan Fund Board, and an annual meeting was to be held every year for the purpose of inspecting the accounts.

By sect. 36 of the Act, the trustees or officers were not personally liable, unless by express agreement (1).

When the Society was started in 1886 the parish priest was appointed treasurer, and O. and R. were appointed trustees. The treasurer died in 1898, when O. was appointed treasurer, and M. was appointed trustee instead of O. M. only attended a few meetings of the committee, and then resigned. In 1896 a lady was appointed clerk, and she took the entire management into her

(1) Sect. 36. And be it enacted, that no treasurer, trustee, or other officer of any Loan Fund Society subscribing a debenture shall be individually responsible in person or property for the payment of the same, or of any interest thereon, but such debenture shall be a charge on the capital and property of the Society alone, unless such treasurer, trustee, or other officer shall in the instrument, or by writing at the foot or on the back thereof, declare his or their willingness to be liable in person or property for the specific sums so guaranteed.

hands. All applications for loans were filled in by her, and one of the trustees gave her cheques for the amount she asked for, without seeing to its application. She made out false records of meetings, and deceived by false books, and by forged or unreal vouchers the auditor sent down annually by the Loan Fund Board. The abstract of accounts were made out by her, and the account for 1898, containing false entries, was signed by O. and R., and the account for 1899 was signed by R. alone. All the rules for the protection of the members were neglected, and in four years the entire funds of the Society had disappeared.

In an action by the debenture-holders against O. and R., claiming that they were liable to make good the loss, the Master of the Rolls having dismissed the action:—

Held, by the Court of Appeal (reversing the decision of the Master of the Rolls), (1) that, although the position of O. and R. towards the debenture-holders was not that of trustee and *cestui que trust*, they were guilty of such negligence and default in discharge of the duties imposed on them by the Act and rules, that they were liable to make good the loss; (2) that they were not protected from liability by the Public Authorities Protection Act.

IN December, 1886, a number of persons formed themselves into a Society, under 6 & 7 Vict. c. 91, at Mitchelstown, in the county of Cork, under the style of the Mitchelstown Loan Fund Society. Rules were drawn up, in pursuance of section 9 of the Act, for the management of the Society, which were approved of by the Loan Fund Board, the material provisions of which were as follows:—

1. All persons being debenture-holders to the amount of £25, together with such other person as they may appoint, shall be considered members of the Society. The amount raised on debenture shall not exceed £3000.

2. That the affairs of the Society shall be conducted by trustees, a treasurer, and committee to be appointed by the members; the treasurer to be the honorary and corresponding secretary of the Society in default of such an officer being otherwise appointed by the Society.

3. That in the trustees shall be vested all property, moneys, and effects whatsoever belonging to the Society. The treasurer shall have the charge and management of the funds and accounts of the Society, and shall have charge of the books. He shall be responsible that an annual abstract of the accounts of the Society, up to the 31st December in each year, be furnished in the printed form forwarded by the Loan Fund Board for that purpose, sometime in the succeeding January.

4. That in case of the absence of the treasurer, the duties of his office shall be performed by some member of the committee chosen by himself and approved by the other members. The committee shall meet weekly to decide upon the applications for loans. The treasurer shall be, *ex officio*, a member of such committee, three to be a quorum. All communications from the Loan Fund

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Board shall be laid before the committee, and be filed in the office for the inspection of all members. It shall be lawful for the trustees and committee to delegate the whole or part of the business of the Society to the treasurer, or any person chosen by him, whenever it may be impossible or inconvenient for the committee to meet, but not otherwise. The fact of such delegation, and the number of days during which it is to be operative, as well as the scope thereof, are to be recorded in the minute-book of the committee.

5. That the trustees and treasurer shall have power to appoint a clerk or clerks, to be approved by the committee, to assist in keeping the books and conducting the business of the Society; provided that the amount of the salary payable to any one such clerk shall not exceed the sum of £80 sterling in any one year, and that the amount of all salaries payable to the clerks and servants of such Society shall not in the whole exceed the sum of £165 in any one year. . . . Receipts are to be taken for all items of office and other expenditure, and said receipts are to be produced to the Loan Fund Inspector, and initialled by him.

7. That no person, being trustee, treasurer, hon. secretary, or member of committee in this Society, or having any control in the management thereof, shall directly or indirectly receive any salary or other remuneration for attendance, or for any other services performed for the Society.

8. That the treasurer shall become bound to the secretary of the Loan Fund Board in the sum of £300, with two solvent sureties in a like sum, and that the clerks and every other officer entrusted with moneys the property of the Society shall in like manner become bound to the said secretary of the Loan Fund Board, the first clerk in the sum of £200 and two solvent sureties in a like sum, for the faithful performance of his duties, previous to any loan being issued by the Society.

11. That funds be raised for the use of the Society by deposits bearing interest at a rate not exceeding 5 per cent. per annum. Debentures shall be granted for sums amounting to £20, and deposit receipts for sums less than £20.

13. That every applicant for a loan shall apply to the clerk of the Society for a printed form of application paper, for which paper a charge of one penny shall be made.

14. That such applications shall be returned to the clerk when filled and signed, who shall lay the same before the committee, and they shall have power to refuse or grant the same at their discretion; provided always that any previous loan obtained by the applicant from this Society shall have been wholly repaid, and that any previous borrower who may have incurred one fine may have the consideration of his application deferred for two weeks; if two fines shall have been incurred, for one month; and if three fines have been incurred, for three months; and if more than three fines have been incurred, it shall not be lawful for the committee to grant such borrower a fresh loan within a period of twelve months from the date of the application of such borrower for the same.

17. That two solvent sureties shall become bound with the borrower for the regular repayment of the loan by weekly instalments of 1*s.* for each £1 lent, by signing together with the borrower a note or security payable to the treasurer of the Society for the time being on demand. Fourpence in the £1 of the sum lent shall be retained at the time the loan is issued as discount thereon; one penny in the £1 on the original sum lent shall be charged as a fine on the

borrower for the first default in payment, and twopence in the £1 on the second default; and such fines shall be paid to the treasurer in aid of the funds of the Society.

20. That the treasurer shall call an annual meeting of the Society on some day in the second or third week of January in each year (of which meeting six clear days' notice shall be given), for the purpose of inspecting the accounts of the preceding year up to the 31st of December, and of transacting any other business pertaining to the affairs of the Society. That at this meeting the treasurer shall produce a statement of the funds and effects and of the assets and liabilities of the Society; and an estimate of the clear net profit or loss to that period shall be submitted, together with a detailed account, specifying the items of expense incurred in the management of the Society. Every trustee, member of committee, or debenture-holder to the amount of £1 shall have a vote at such meeting, and the senior trustee shall be the chairman of such meeting, and shall have a casting vote. The clear profit of the Society for the past year having been declared and ascertained to be correct, the meeting shall then proceed to allocate at least one-tenth of such clear net profit to the fund for the security of the debenture-holders, pursuant to sect. 44 of 6 & 7 Vict. c. 91, and may appropriate such portion of the residue thereof as they shall think proper to the support of any dispensary, hospital, or infirmary in the district or county in which such Society shall be established, or such other charitable or useful purpose as they, with the approbation of the Loan Fund Board, shall think fit.

21. After reciting that the Society might, from time to time, possess various descriptions of property, such as accumulated profits, interest in a lease of premises, office furniture, &c., provided that the secretary of the Loan Fund Board for the time being was constituted one of the trustees of such property.

When the Society was started in 1886 Dean O'Regan, the Parish Priest of Mitchelstown, was appointed treasurer, and the defendants William J. O'Brien and Thomas Roche were appointed trustees, and J. S. Casey clerk.

The Society raised by loans on debenture and deposit receipts a fund of £2050, with which they purported to make loans of the nature, and in the manner, prescribed by the Act and the Rules. Casey retired from the office of clerk in 1889, and Miss Moriarty was appointed clerk in his stead, but the duties of the office were really discharged by her aunt, the defendant Mary O'Brien.

Complaints were made on several occasions of the way in which the business was conducted, and of the manner in which the accounts were kept. In October, 1896, a public inquiry was held at Mallow to inquire into the working and management of the Society, which disclosed the fact that the Society, in violation of the provisions of sect. 38 of the Act, was carrying on its business

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in the public-house of the defendant Mary O'Brien. The office was then separated from the business part of the house, with a separate entrance from the street, and Mary O'Brien was appointed clerk at a salary of £70 a year. In the course of four years she embezzled the entire funds of the Society. In the case of loans she filled in the names of the applicants and two sureties in the forms: the sureties did not sign, and there was a certificate at the foot certifying to the fitness of the applicant. Roche and William J. O'Brien, who had the funds in their names in the bank, gave her a bulk cheque for the amount she asked for, without seeing to its application.

Thomas Roche alone, for several years, attended the weekly meetings, and sanctioned a number of loans which were proposed by Mary O'Brien.

At the trial Mary O'Brien admitted that she had destroyed all the promissory notes, and she tore out of the minute-book all the entries subsequent to November, 1898. The annual meetings of the Society, prescribed by Rule 20, were not held.

Several letters were written to Dean O'Regan by the secretary of the Loan Fund Board in consequence of reports by Mr. Young, the auditor, complaining of the way the books were kept and the accounts were made out, and he expressly stated that Mary O'Brien should not be allowed to write up the books. In June, 1897, Dean O'Regan tendered his resignation owing to the action of the Local Government Board, but on being pressed to continue to act as treasurer he continued to do so until his death in June, 1898. After his death, William J. O'Brien was appointed treasurer, and John F. Meagher was appointed a trustee in his stead, but Meagher only attended a few meetings of the committee until he resigned. He never signed any account or document. William J. O'Brien resigned the office of treasurer in December, 1899.

The abstracts of the accounts were prepared by Mary O'Brien. The account for the year 1898 showed:—Loans issued to borrowers, £7267; amounts repaid by borrowers, £6776 18*s.*; sums in borrowers' hands, December 31st, 1898, £2557 7*s.*; gross profits, £260 6*s.* 0½*d.*; net profits, £45 2*s.* 6½*d.*; fresh deposits lent to Society, £440. These accounts were signed by W. J.

O'Brien and Roche on the 18th January, 1899, and they vouched the reserve fund at £218 3*s.* 4*d.*

The account for 1899 showed:—Loans issued to borrowers, £7803 3*s.*; amounts repaid by borrowers, £7653 5*s.*; sums in borrowers' hands, £2707 2*s.*; gross profits, £287 18*s.* 4½*d.*; net profits, £72 12*s.* 9½*d.* This account was signed by Roche on the 31st January, 1900, and the reserve fund was stated to be £290 16*s.* 1½*d.* These accounts were alleged to be false, and the amounts stated to be due by borrowers, and the loans issued during the year, to be fictitious.

It did not appear whether originally there was any bank account kept for the moneys of the Society, but on the 11th February, 1897, an account was opened at the Mitchelstown Branch of the Bank of Ireland in the names of Dean O'Regan, William J. O'Brien, and Thomas Roche. It commenced with an overdraft of £150. On the death of Dean O'Regan this account was closed, and a new account was opened in the names of William J. O'Brien and Roche, which was really a continuation of the old account. It continued until June, 1900, when it was closed with an overdraft of £500.

The action was brought in June, 1901, by four debenture-holders suing on behalf of themselves and all other debenture-holders and depositors against W. J. O'Brien, Roche, Meagher, and Mary O'Brien, claiming that they should make good the loss. The three first-named defendants denied having misappropriated any of the funds of the Society, or that they had been guilty of any fraud or breach of trust, and they also pleaded that the accounts were audited each year and passed as correct by the auditor of the Loan Fund Board, and that the defendants believed them to be true. The defendant Roche also pleaded the Public Authorities Protection Act, 1893. Mary O'Brien did not defend the action. There was no written declaration of liability for the debentures by the trustees or treasurer.

M. J. Bourke, K.C., O'Connor, K.C., and *P. Fleming*, for the plaintiffs.

S. Ronan, K.C., Ignatius J. O'Brien, K.C., and *J. F. Moriarty*, for William J. O'Brien.

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July 15.

The Solicitor-General (*Campbell, K.C.*), *T. M. Healy, K.C.*, and *T. Sullivan*, for T. Roche.

C. L. Matheson, K.C., and *J. F. Moriarty*, for J. Meagher.

The Master of the Rolls :—

The Mitchelstown Loan Society was established under the Act 6 & 7 Vict. c. 91, in December, 1886. The defendants William J. O'Brien and Thomas Roche were appointed trustees, and the Rev. Dean O'Regan, Parish Priest of Mitchelstown, was the treasurer. I may say that on the evidence he was the Society from 1886 till his death in 1898. He was its treasurer and manager, to—I do not say the intentional—but to the practical exclusion of everyone else except the clerk, in whom, at least in the case of Mary O'Brien, he had unbounded confidence.

The first clerk was a well-known gentleman, Patrick Sarsfield Casey, and on his ceasing to act, a Miss Moriarty was appointed in his place. She, however, was only a figurehead, the real clerk being her aunt, the defendant Mary O'Brien, who was formally appointed clerk in 1896, afterwards at a salary. The statement of claim mentions a trivial circumstance as to the place in which the meetings of the Society were held and its business transacted, which has no bearing that I can trace upon any question in the case, except that upon the occasion referred to a public inquiry was held by the Loan Fund Board in Mitchelstown, which would have afforded an additional opportunity, if such were needed, for bringing forward complaints as to the conduct of the affairs of the Society. The defendant Mary O'Brien was examined before me, and she is a person of highly respectable appearance, intelligent, and of determined and commanding presence. In a portion of her house (which is a public-house or hotel), partitioned off for the purpose, the business of the Society was transacted since 1896. It had previously been done in the public-house itself.

The Society had raised money from time to time on debentures and deposit receipts bearing interest, and the money thus procured was lent out to borrowers for short loans on promissory notes, each secured by two sureties. The debentures were in the statutory form, and purported to create a charge upon the funds and property of the Society alone, and gave no personal remedy against

anyone. The present action is brought by individual debenture-holders and depositors, on their own behalf and on behalf of the other persons of the same classes, against the Society by its secretary and its trustees and treasurer, and Mary O'Brien the clerk. The latter has not defended the action. The plaintiffs claim personally £410 or thereabouts, principal moneys, and the total debt of debentures and depositors is about £2070. The Society admittedly has now no funds, and the action is based upon charges of fraud and peculation against its officers. There is also an alternative charge of gross neglect, but the substance of the allegation is personal fraud.

Paragraph 5 of the statement of claim alleges:—"The said Thomas Roche," that is the defendant Thomas Roche, "is a draper in large business in said town, and utilizes his position as such trustee to make such loans to insolvent customers of his who were in debt in his books to enable them to pay off their indebtedness to him." A more foul charge of fraud it is impossible to conceive. And in paragraph 9 it is stated:—"Said Act required the trustees to cause an abstract of the accounts for each year to be made out on the 31st December, with a statement of the funds and liabilities of the said Society, and to transmit a copy of such abstract and statement, certified by the treasurer and at least one trustee, to the Loan Fund Board in Dublin. The abstracts so furnished by the defendants William J. O'Brien, Thomas Roche, and Mary O'Brien from year to year down to February, 1901, were false and misleading, and fraudulently misrepresented the funds and property, debts and liabilities, and condition and affairs of said Society." And paragraph 10 states:—"The defendants William J. O'Brien, Thomas Roche, John F. Meagher, and O'Brien, or some of them, have misappropriated, or by their connivance, mismanagement, negligence, and breaches of trust, procured, caused, and suffered the misappropriation of all the funds, effects, and property of said Society, and there are now no capital or assets of said Society available for payment of the debts of plaintiffs and other debenture-holders and depositors of said Society."

These charges in the severest form they can assume have been fully proved, and indeed admitted in the case of Mary O'Brien,

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who stole the whole of the funds herself. How she did it does not exactly appear; for while acknowledging (after being cautioned by me) that she took and misapplied the entire of the Society money, she would not, or could not, explain the exact *modus operandi*. She denied that she had used forgery, and no case of a forged document was produced; but of course little weight is to be attached to her statements when not corroborated. The fact remains that the money is gone and that she took it. She did say that when the money was lent by the Society she was in the habit of accepting undated promissory notes, and of retaining them when paid off so as to be able to use them once again or oftener as vouchers for outstanding loans, while the loans were in fact paid off. I do not doubt that this was one of the means employed, but do not believe it to have been the sole one. With mercantile people, of course, such a practice would have been impossible. The note would have had to be given up when paid off. But she was dealing with ignorant rustics and not with mercantile men.

It appears that the affairs of the Society were supposed to be in perfect order till July, 1900, when Mary O'Brien announced that the funds were all gone and that she had embezzled them.

It is under these circumstances that the action is brought, for in fact no funds whatever of the Society are available.

The case of the plaintiffs is very simple, and certainly deserves sympathy. They are poor uneducated women to whom their deposits in this Society are of relatively immense importance. Their belief in it was unbounded. It was managed for years by their respected parish priest, who himself had thorough confidence that it was managed not only honestly but on correct business lines. Was not he the treasurer and sole manager? He was also a debenture-holder to a considerable amount himself. He did not know, however, of what Mary O'Brien was capable. He had no suspicion when he died, yet Mary O'Brien swears, and it may be true, that all the defalcations were committed in his time.

The case of the defendants William O'Brien and Thomas Roche is, apart from denial of fraud or negligence, that the embezzlement did not take place under circumstances creating any liability on their part, either as trustees or as (in the case

of O'Brien) treasurer. They also relied on the Statute of Limitations.

Besides these defences, John F. Meagher also contended that he had never been trustee at all. During the hearing I expressed the opinion that this defence wholly failed. It is true he hardly did anything as trustee, and sent in his resignation shortly after his appointment, but he was elected—and after hesitation consented to act—and did act. I was not favourably impressed by his action in this matter.

In addition to all these grounds, Mr. Ronan strongly relied upon a ground of defence, perhaps not definitely pleaded, but disclosed (if it be a defence) by the proved facts. He contended that this is a creditor's action; and that the trustees and treasurer, if liable to the Society, are not trustees or treasurer for its creditors; and that therefore the negligence of the trustees affords no cause of action to debenture-holders or depositors. The answer made to this is, that the debenture-holders *are* members. It is thus in every aspect of the case needful to see what is the constitution of the Loan Society in question.

It was, as I have said, founded under the 6 & 7 Vict. c. 91, the second section of which provides for general control and superintendence of all charitable Loan Societies and Charitable, Pawn, or Deposit Offices established or to be established in Ireland. Under the authority of the said recited Acts or this Act there shall be a Board in Dublin to be denominated "The Loan Fund Board," and soforth. And section 4 gives the Board power to "inquire into the proceedings of all Loan Societies, &c., in order to ascertain whether their rules have been duly certified and enrolled, and have been and are duly observed and attended to, and whether their funds are applied to the purposes for which the same are intended." Section 9 provides for the formation of Loan Societies, and gives power to make rules and to raise money from members "or from other persons." Section 10 and following sections (11 to 15) are consequential. Section 16 gives power to elect officers. The Loan Society may "elect and appoint such persons into the offices of trustee, manager, treasurer, secretary, clerk, messenger,

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or other officer as they may think necessary." Section 18 enacts that "all moneys and property belonging to the Society shall be vested in the trustee or trustees of such Society for the time being for the use and benefit of such Society and the respective members thereof" with power to sue and be sued as such.

Section 21 provides that the treasurer or other officer "entrusted with the receipt or custody of any sum or sums of money belonging or lent to any loan Society" shall give security.

Sections 22 to 34 are provisions as to loans by the Society. Section 40 provides for yearly abstract of accounts by the "trustees or managers."

I now come to the Rules of the Mitchelstown Loan Fund framed under section 9.

1. Debenture-holders to the amount of £25 to be "considered members . . . together with such other person as they may appoint."

No. 2 of the Rules provides—"That the affairs of the Society shall be conducted by trustees, a treasurer, and committee to be appointed by the members."

3. The property is vested in trustees (section 18). The treasurer to have the care and management of the funds and accounts of the Society and charge of the books. He shall be responsible for the annual abstract of accounts.

No. 4 provides for the delegation of his duties on approval by the committee. Power is given to the "trustees and committee to delegate the whole or part of the business of the Society to the treasurer or to any person chosen by them, whenever it may be impossible or inconvenient for the committee to meet." An absolute invitation to laxity—"the fact of such delegation and soforth . . . to be recorded in the minute-books of the committee."

No. 8 provides that the treasurer and clerk are to give security.

No. 21 provides that the Secretary of the Loan Fund Board is to be a trustee of accumulated funds. "To prevent any misappropriation of such property the Secretary of the Loan Fund Board for the time being, in the name and on behalf of such Board, shall be and is hereby constituted one of the trustees of such property, and it shall not be lawful for any

person or persons, being members of this Society, to realize, dispose of, or in any way appropriate such property on the dissolution of this Society without the consent in writing of such Board, signed by at least two of its members and countersigned by secretary."

These rules are signed by three members of the Society and by the Secretary of the Loan Fund Board. They are adopted and approved by the Loan Fund Board and certified by its counsel as containing nothing contrary to the Act.

I do not say that the confusion is entirely the fault of the rules; it originated with and permeates the Act as well. But whoever is answerable for it, it is nothing short of chaos come again. As long as everything went smoothly, it would not matter who were the members; whether the loans were authorized and made by the trustees, by the committee, by the treasurer, or by a delegate of some one or other of them, or by any permutation or combination of them. But when a loss has arisen, and it becomes needful to ascertain, first, whether there has been a breach of duty, and, second, what loss has resulted therefrom, it is next to impossible to derive any assistance from the rules as framed and certified, so as to say who is to blame and for what.

Thomas Roche the defendant was examined as a witness by the plaintiffs, and stated that he was appointed a trustee in 1886, and attended weekly meetings of committee and was a trustee all through, though latterly, owing to failing health, he seldom attended. He saw Mr. Meagher attend and sign minutes as chairman after his appointment as trustee, which took place on the death of Dean O'Regan, the treasurer, in 1898 (when O'Brien became treasurer and Meagher trustee in his room). The bank account, which started with an overdraft, was first in the names of the Dean, O'Brien, and witness, and afterwards in the name of O'Brien and witness. He advised on the loans to be made; and the extraordinary thing—and a thing most creditable to the borrower—is, that no loss was sustained from that source, every penny having been paid off except some £15, which is recoverable. He signed the annual accounts, which were all in form, and all accepted by the Board.

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He thought the clerk must have kept two sets of books, forged bills, and embezzled the loans.

He proved that the accounts were inquired into, inspected, and passed every year by the Loan Fund Board, and that he, as trustee, had no further or other means of information as to the accounts or the correctness of the statement of assets than the public officer or accountant whose duty it was to inspect and examine; and had no suspicion that anything was wrong till the break-up. The greater part of the bank overdraft was obtained almost by force out of Miss O'Brien's property, but £240 is still due for which witness and O'Brien are answerable.

Defendant Mary O'Brien said that she did all the work of the Loan Fund. The applications for loans by borrowers were when brought forward not signed by them or by their sureties, but when approved were signed by the chairman of the meeting (as I have said, no loss accrued from this source). Roche was a regular attendant, and often acted alone, and sanctioned loans as if three had been present, just as in Dean O'Regan's time. Meagher when proposed as a trustee at first refused, but afterwards consented, and was proposed and seconded. Mr. O'Brien only attended one meeting after his appointment as treasurer. She swore to Meagher's name as signed by him to application form (this is not denied). There was no general meeting held on 18th January, 1899, though there is a minute as if one had been held, signed by O'Brien. Witness brought it to him, and he signed it; nor was there any in January, 1900. A quorum was necessary, and she put down names when a quorum did not attend.

She admitted having torn and destroyed the leaves of the minute-book where their absence appears. The treasurer never checked anything. The money was always in her hands.

She said that she did not receive or misappropriate any money after December, 1898. The defalcations took place in the Dean's time. She got the money mixed up with her own, and it was muddled away. If the governors had made a careful examination they would have had only the same materials as Mr. Young, and afterwards Mr. Scarr, the Government auditors, had before them every year. During the time covered by the bank account she misappropriated nothing.

Meagher, part of whose evidence was evasive, stated that he had not meant to act as trustee, and, when he heard of his appointment, straightway resigned, and only attended a meeting or two, doing practically nothing.

I have come to the conclusion that the defendants one and all left the affairs of the fund in the hands and control of Miss O'Brien, and that they trusted her implicitly, no suspicion of her probity ever crossing their minds. Dean O'Regan, who started the Society and "was the Society," did the same. There was no circumstance of which I am aware brought home to them or any of them which suggested doubts about her. What they did attend to, so far as they can be said to have attended to anything, was the selection of persons to whom loans might safely be made, and the approval of their proposed sureties; and no loss whatever is traceable to any want of care in this respect. Further, they one and all considered that when a duly qualified Government officer was charged with the duty of investigating all the accounts once at least in each year, and of seeing not only that the rules had been observed, but also that the funds had been applied to purposes for which they were intended, they, who were not experts or accountants, but plain country dealers, might safely rely on it that that duty was discharged.

In a case like this, founded originally and mainly on fraud, though alternately, or also, on neglect, the *onus* of proof is on the person alleging it. The plaintiffs, however, contend that they have made out, if not fraud, at least negligence, want of care, want of interest even in the affairs of the Society. They say, "It is too much to expect us to show exactly what particular neglect at any specified date led to the loss of some particular sum of money. The whole of it has been lost; and you, though we can not exactly say what you ought to have done on this day or that and left undone, did nothing at all; and a trustee cannot shelter himself behind his own neglect." There was, Mr. O'Connor put it, the duty of general management cast upon the defendants, and they neglected it. All the money was paid out without supervision or control.

The special defendants respectively occupied the position of trustee and of treasurer.

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Take the trustees first. What is their position, and what their obligation?

These, in my opinion, must be looked for in the statute and rules. It will not do to say, "You are trustees—no matter how appointed—and the law says that a trustee is answerable for gross negligence." That may be right, but it is not enough. What is the trust, and who are the *cestui que trusts*?

One would suppose that *prima facie* trustees of such a Society, appointed under an elaborate Act of Parliament and rules framed and sanctioned by public authority, would have their functions defined. The Act calls them trustees, and vests the property of the Society in them; but this is merely in order that they may sue and be sued for it, because the treasurer is the person who is to have the "receipt and custody," and "care and management" (rules) of the funds, and he is to give security not they. No doubt they are to be members of committee, and as such to sit and advise on loans; but in this case, as I have said, Roche at least certainly took an immensity of trouble, and in no single case is a loss attributed to his want of care; and, indeed, no loss whatever has occurred from failure of borrowers to repay. It was irregular and hazardous to pass loans without having the applications filled up by the parties and sureties; but the practice existed all through the *régime* of Dean O'Regan, and was never objected to, and no harm has come of it. The loss arose through robbery; robbery which the trustees in whom the property was nominally vested knew nothing about, and could hardly be expected to detect, because though the property was legally vested in them its "receipt and custody" and its "care and management" were vested in another, with power to delegate any or all of his duties to anyone else.

But apart from this, the trustees were assured by law that in every year the accounts and affairs of the Society would be subjected to a complete and searching investigation by a skilled and experienced Government inspector; and an inspection was held every year from 1886 on. If *he* found nothing wrong, were these country traders to go behind his back and succeed were he failed? Supposing (as was well put) instead of relying on a Government inspector they had themselves employed the same gentleman, at

their own expense, to do what they were not well fitted to do themselves, and had acted on his report that all was well, would they still be held answerable? It needs not *Speight* v. *Gaunt* (1) in the House of Lords to answer this question. Of course, I assume on their part the absence of ill-faith. No dishonesty was attributed to them on the trial; and the fact is they received not one penny of the proceeds of Mary O'Brien's frauds, but are, on the contrary, each and all, considerable losers by them. For the allegations of fraud in the statement of claim no scrap of proof was forthcoming or even suggested.

Mary O'Brien swore that every penny drawn out of the bank was properly applied; and notwithstanding Mr. O'Connor's elaborate examination in reply of the figures in the pass-book, nothing in it shows that this was not so, and she was not cross-examined as to that statement at all.

Had I to decide the question, I think that the trustees were not trustees for creditors. The suggestion is made that, as creditors, the debenture-holders were members of the Society, and could sue as such. But they do not sue as members, *i.e.* as debtors on the debentures, but solely as creditors, "on behalf of themselves and all other creditors," and the joinder of claims as depositors shows this to be so; and not all debenture-holders, but only those for £25 or upwards are to be "deemed" members; and the defendants themselves are of this class. But I prefer to rest my decision on the broader ground. The Act does not say who are to be members, a very singular omission, but not more singular than other things in the Act.

The truth is the function and qualification of members, trustees, treasurer, and committee are left in the statute in wild confusion, and the rules, in which we might have expected to find some clear and definite guidance on these obviously vital questions, are more confused and perplexing still. If the inspection by the public officer is not to be taken as being sufficient to justify simple people in acting on it, when they do so honestly, one asks oneself of what earthly use or value is it except to prove a snare? The inspector was in Court (it was stated) during the whole of the case, and was not examined.

(1) 9 A. C. 1.

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There remains the case of the defendant O'Brien, who became treasurer after the death of Dean O'Regan, having been trustee for many years before. It is not shown that any loss is attributable to his neglect as treasurer. The only evidence as to the time at which it occurred is that of Mary O'Brien, not very trustworthy or reliable evidence, but still there is no other. I think that the *onus* is on the plaintiffs; and they have not shown me that O'Brien's neglect of duty caused any loss to the fund. He found a state of things existing under which everything was left to the clerk. The Government inspector, so far from condemning what was going on, stamped it with his annual official approval. Even the excited rush which took place when the Board became aware that the Society met and had its offices in licensed premises, and when a public inquiry was held to prove what was patent to everybody, could only suggest that there was nothing else to condemn.

Having regard to all the circumstances of the case, the position in life and *status* of the defendants, their undoubted honesty of purpose, the failure of the plaintiffs to prove anything definite to connect their action with the loss of the funds, and the failure of the public officer appointed and paid for the purpose, to afford them any guidance, or to detect and rectify abuses or lax practice, I am of opinion that the action fails, and must be dismissed as against the trustees and treasurer. This dismissal, however, must, for the reasons I have sufficiently indicated, be without costs.

R. W. L.

Appeal. Nov. 24–27.

The plaintiffs appealed (1).

Matthew J. Bourke, K.C., O'Connor, K.C., and *P. D. Fleming,* for the appellants:—

The defendants W. J. O'Brien and Roche were trustees of these funds; they are so described in the Act and rules, and they stand in the position of trustees towards the depositors and

(1) In the Court of Appeal before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.

debenture-holders as their *cestui que trusts*: *Attorney-General* v. *Belfast Corporation* (1). The funds of the Society were mortgaged to the debenture-holders under section 36 of the Act, and they have therefore a direct right of suit against the trustees, holding that property in trust for them. The gross negligence and violation of duty by the defendants constitute breaches of trust. In direct violation of the Act and rules the trustees and treasurer left all the funds and books in the custody and control of the clerk, and the trustees and committee omitted to observe the precautions prescribed by the rules for the protection of the funds. It was this that caused the loss.

The Public Authorities Protection Act, 1893, affords no defence. It was meant to protect persons discharging public duties or executing statutory powers: *Fielding* v. *Morley Corporation* (2); a Society like this earning profits is not within it: *Attorney-General* v. *Proprietors of Margate Pier* (3). Several Acts of Parliament had limited the time within which persons acting in execution of statutory or other duties might be sued. The Public Authorities Protection Act, 1893, included in one Act the provisions previously existing and repealed the prior Acts. But a series of decisions under the former Acts had settled that they only applied where the act complained of was done in the honest belief of a state of facts which, if existing, would have justified the act under the statute: *O'Dea* v. *Hickman* (4); *Dalton* v. *Mayor of Clonmel* (5); *Attorney-General* v. *Hackney Local Board* (6); Maxwell on Statutes, 324; *Leete* v. *Hart* (7); *Chamberlain* v. *King* (8). The policy of the Legislature was to give protection to public bodies acting in discharge of duties imposed on them: *Butler* v. *Bray Township Commissioners* (9).

The Court of Appeal heard one counsel for each of the three principal defendants.

(1) 4 Ir. Ch. R. 119, 159.
(2) [1899] 1 Ch. 1.
(3) [1900] 1 Ch. 749.
(4) 18 L. R. Ir. 233, 239; 20 L. R. Ir. 431, 436.
(5) 14 I. L. T. R. 118.
(6) L. R. 20 Eq. 626.
(7) L. R. 3 C. P. 322.
(8) L. R. 6 C. P. 474.
(9) I. R. 11 C. L. 181, 187.

Appeal. 1902.

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Henry, K.C., for W. J. O'Brien, *The Solicitor-General (J. H. Campbell, K.C.)*, for Roche, and *Matheson, K.C.*, for Meagher :—

The relation between the defendants and the plaintiffs was not that of trustee and *cestui que trust* ; the defendants were merely persons acting in discharge of a duty which devolved on them by statute. Debenture-holders have no more ground for any cause of action against these defendants than debenture-holders of a joint-stock company would have against its directors. From start to finish nothing was brought to the mind of these trustees of what was going on. There is no charge of fraud against them, nor is it suggested that they ever got any of this money. They trusted the clerk, as also did Dean O'Regan in his lifetime, and she embezzled the funds. Moreover, these Societies are under the control of the Loan Fund Board in Dublin, and their auditor had audited the accounts every year. The plaintiffs, with the help of an accountant, with all the books and documents, have been unable to trace the money, or to say how the fraud was committed. How can it be said that the defendants ought to have found out the fraud without any such assistance? Then there is the defence on sect. 36 of the Act ; the defendants signed no document creating personal liability.

The defendants are entitled to the protection of the Public Authorities Protection Act, 1893. By section 6 of 6 & 7 Vict. c. 91 the action must be brought within six months ; that was repealed by the Statute Law Revision Act, 1894, and one general Act was passed. The object of the Act was to relieve persons discharging public or statutory duties from acts of neglect or default of duty, so long as they were not guilty of fraud : *Cree* v. *Vestry of St. Pancras* (1) ; *Markey* v. *Tolworth Isolation Hospital* (2).

1903. Jan. 30.

LORD ASHBOURNE, C. :—

This is an appeal from the Master of the Rolls, which raises some interesting questions with reference to Loan Fund Societies, and particularly with reference to the Mitchelstown Loan Fund Society. The action was brought by certain debenture-holders,

(1) [1899] 1 Q. B. 693. (2) [1900] 2 Q. B. 454.

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on behalf of themselves and all other debenture-holders, against the Mitchelstown Loan Fund Society, and three persons named as defendants, O'Brien, Roche, and Meagher, the Society being added, because they were necessary as formal defendants.

The late Dean O'Regan, a well-known clergyman in that part of Ireland, took an interest in the Society, as he thought it was doing good. He identified himself very largely with its working, and watched its proceedings and development. But the principal person who worked the Society, and whom Dean O'Regan trusted, was Miss O'Brien, a woman of commanding personality, nerve, and ability, and not impressed with conscientious views as to how the money was to be applied. Dean O'Regan died in 1898, but during his lifetime Miss O'Brien was allowed by Dean O'Regan and his colleagues to keep the books, to fill all the forms, and to supply all the information. She was a clever and unscrupulous woman, and her dealings with the funds of this Society have been made plain by this proceeding, and by what has occurred since the hearing. But there is an end to everything in this world, especially in the case of a Loan Fund like this. Some of the debenture-holders thought that they should look out for themselves, and so they brought this action. It is worthy of note that the three persons named as defendants are debenture-holders, some of whom have lost money in this Society, and may lose more. There is no suggestion that their honesty or character is attacked, but they occupied certain positions in the Society which entailed certain obligations, and the discharge of certain duties, and they did not discharge them.

The Master of the Rolls arrived at the conclusion that there is no ground even for directing an inquiry against any of the defendants Roche, O'Brien, and Meagher in respect of the losses sustained by the plaintiffs, and he thus states the grounds of his judgment:—"Having regard to all the circumstances of the case, the position in life and *status* of the defendants, their undoubted honesty of purpose, the failure of the plaintiffs to prove anything definite to connect their action with the loss of the funds, and the failure of the public officer, appointed and paid for that purpose, to afford them any guidance or to detect or rectify abuses or lax practice, I am of opinion that the action fails."

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I have arrived at the conclusion that, so far as Meagher is concerned, that judgment should be affirmed. I cannot see any grounds upon which it would be right to attach liability to him; no violation of the Act or rules has been proved against him, and he only attended three meetings. But I cannot concur in the view of the Master of the Rolls as to the defendants Roche and O'Brien; in my opinion their position is different. They accepted the position, which entailed important duties towards those who dealt with the Loan Fund. Those duties have been expressly or impliedly created by the Act, and assigned to the trustees and treasurer, and as these duties have been deliberately neglected, and *prima facie* loss is attributable to their neglect, I think there is ground for directing an inquiry on the terms suggested, and that we must direct it, however much we may regret that officials shall suffer who have not acted dishonestly.

Then, as regards these two defendants, we have to consider the validity of the defence raised by the Solicitor-General on the Public Authorities Protection Act. That Act uses very wide language, and though it has been discussed in a considerable number of cases, its scope has not yet been judicially so defined as to furnish a reliable guide in all cases. The case of *Ambler* v. *Corporation of Bradford* (1) decides that the Act should be construed looking to its general scope as expressed in its title, which is "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties," and I think the Act has no application to such an action as the present, which is one brought by members of the Loan Fund Society against three individual trustees for neglect and breach of duty imposed by the Act for the protection of the members of the Society, when by reason of that neglect and breach of duty loss has been incurred. The Act could be no protection to the defendants if they held the money of the Society in their hands, and the present case really only differs in degree. I have had an opportunity of reading the full and detailed judgment which Walker, L.J., will deliver, and as I entirely concur in its reasoning and its result, I do not desire to say anything more upon the facts or law of the case.

(1) [1902] 2 Ch. 585.

The result is that the decree of the Master of the Rolls will be confirmed with costs so far as it affects the defendant Meagher, but it must be reversed so far as it relates to the defendants Roche and O'Brien. It is quite plain that Roche and O'Brien trusted Miss O'Brien implicitly, and they never applied one atom of independent judgment to the management of the Loan Fund Society, its loans, or its accounts. They neglected all their real duties, and violated all rules laid down for their guidance, and they cannot complain if they are fixed with some liability on taking the account.

There may be some care needed in directing the inquiry upon which their liability is to be ascertained, but some dates stand out with conspicuous clearness. I take my stand on the opening of the bank account in February, 1897, and on the account signed by these two defendants for the year 1898. If no agreement can be arrived at, there must be an inquiry as to the damages sustained by reason of the defendants' conduct, and in taking such inquiry the accounts signed by these defendants should be taken as *prima facie* evidence of the state of the Society at the date, with liberty to all parties to show any error that there may be therein. But very probably there may be some agreement or settlement arrived at. As the appeal succeeds, the order of the Master of the Rolls must be varied so far as the defendants Roche and O'Brien are concerned, and they must pay the costs of the appeal.

FITZ GIBBON, L.J.:—

I concur in the conclusion announced by the Lord Chancellor. Walker and Holmes, L.JJ., will state their opinions upon the defence of the Public Authorities Protection Act, and I agree with them that the Act has no application to such a case as this.

The conduct of the defendants was not confined to non-feasance, inaction, acquiescence, or mere default; and it would be a reproach to our law if those who lost by what they did had no remedy. The Loan Fund Society was governed by the elected representatives of those who had a money interest in the concern. It was not to be carried on as a venture. It was placed under the control of a Government Department, which did nothing effectual, though the irregularities which led to the ultimate

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mischief were reported to it. The accounts were supposed to be audited by a public official, but his reports and criticisms were set at naught: the rules, sanctioned by the Loan Fund Board, provided elaborately for the safety of the capital, and for the regularity of the transactions; but they were systematically violated, or neglected. Now, no one can tell what has become of the property; but all parties agree in asserting that it has been entirely lost.

We cannot make a decree merely because the plaintiffs ought to have a remedy. Leaving the statutory plea to be considered by my colleagues, I turn to the general question. What is the relation between the governing body and the members of this Society? The defendants were members of the governing body. The relation is not strictly that of trustee and *cestui que trust*, not that of master and servant: it is that of representative officers with defined duties, which they are bound to perform for the profit and protection of their constituents—namely, themselves and their partners. Neglect of duty causing damage is the gist of the action. Recourse is had to the equitable jurisdiction, not because the remedy by action at law for damages would not lie, but because the procedure in equity for inquiry and account offers special advantages.

The facts which fix Messrs. O'Brien and Roche with liability are few and clear. On February 11, 1897, being officers of the Society, they commenced a new method of dealing with its funds. They had the receipts from week to week lodged in bank in their own names; that is the same as if they put the money into their own pockets, for safe-keeping, pound by pound. Having thus taken charge of the funds, they cannot free themselves from the responsibility of seeing the money properly applied. They are accountable for it in every sense. The bank account was closed in a way which has hitherto remained wholly unexplained; but while it was running, large sums were lodged and drawn, and all these sums passed through the hands, in law and in justice, of the parties in whose names the account stood. We presume nothing against them previously, but we must declare the date from which their liability to account began to be the date upon which they opened the bank account, February 11, 1897. From

that date they are answerable for all money that came under their control. On January 31st, 1899, purporting to obey the regulations by which the Society was governed, they signed an account for the year 1898, which they were bound to sign as officers of the Society. That account will be a most material document upon the inquiry which must be directed by our decree, because it will be *prima facie* evidence to charge those who signed it, and it contains specific figures which can be traced back into the books kept by the defaulting clerk. The account seems to contain tots of money received and paid out, which appear also in the balance-sheets, and the same figures, with the particulars, are probably to be found in the books which contain the entries of specific transactions, and the names of the parties to them. I cannot believe that there were no such transactions. If there were, money was forthcoming for which the defendants are answerable. If there were not, it is hard to see where the money came from that was lodged in bank, but the defendants are accountable for it all the same. The signed account for 1898 is *prima facie* evidence against both O'Brien and Roche, who signed it, of the affairs and condition of the Society on the dates given, and of the truth of the matters therein contained. The account for 1899 is evidence in the same way against Roche who signed it.

Our decree will declare that the defendants Roche and O'Brien were guilty of neglect and default as alleged, and that they are responsible, as from February 11, 1897, for all loss caused thereby. Thereupon an inquiry and account will be directed to ascertain the amount of the loss, and on that inquiry and account, the document signed by O'Brien and Roche in 1899, and that signed by Roche in 1900, will be declared to be *prima facie* evidence of the financial condition of the Society at the respective dates of these documents, and of the truth of the matters therein contained. But it would be unjust to hold the defendants conclusively bound by what they signed, and accordingly we shall give all parties liberty to surcharge or falsify or show any errors in the signed accounts. In this we adapt to the circumstances of this case Seton's Forms, and Kindersley V.-C.'s decree in *English* v. *Baring* (1).

(1) Seton on Decrees, 4th Ed. (1879), vol. ii., pt. iv., sec. iii., Form 3, p. 792.

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I am not satisfied that it will prove impossible to ascertain how the capital has disappeared. I see clear proof that real transactions of large aggregate amount were going on during the currency of the bank account which was opened in February, 1897. It may turn out that the substantial loss occurred in a short period after that account was closed. However that may be, we merely treat these gentlemen as cashiers who had a certain amount of money passing through their hands between two fixed dates, and afterwards signed documents indicating the existence of definite sums at a later period. They may, perhaps, be able to displace this evidence, and to prove either that no such money ever reached their hands, or that it was lost in some way for which they are not answerable—in other words, that no reasonable care on their part could have prevented the loss. But the basis of their *prima facie* liability is their actual possession of the money; when it came in, they seem to have handed it over to the clerk, taking her word for what was received, and giving her cheques against it for whatever sums she asked, leaving her to dispose of the money as she pleased. They dealt with the property of the Society entrusted to them in a manner inconsistent with the rules both of the Society and of prudence, and they must account accordingly.

As to Meagher, I do not dissent from my colleagues, though I think that we are letting him off. He accepted the position of a trustee, but unwillingly; he attended three meetings, but he signed nothing, except some irregular forms, on which it is not proved that anything was lent. There is nothing to show that he did anything resulting in actual loss, or that he ever had anything under his actual control. He must abide his own costs in the action, for having acted as he did; he brought the suit on himself. But he must have his costs of the appeal against the plaintiffs. The other two defendants must pay the costs in this Court, and in the Court below up to the decree.

Walker, L. J.:—

I concur, and inasmuch as we are differing, as regards the defendants Roche and O'Brien, from the view of the Master of the Rolls, I shall state my reasons at some little length.

Loan Fund Societies, of which the Mitchelstown Loan Fund Society is one, are constituted partly by Act of Parliament and partly by rules having the force of an Act, and we must find in those their powers and the duties imposed on trustees, managers, and treasurers for the protection of members of the Society, of whom the plaintiffs are some, and also their corresponding liabilities. These societies are voluntary associations whose object is to raise, by borrowing on debentures and deposits, funds for granting loans to industrious classes in their district. Their affairs are to be conducted by trustees, a treasurer who is an *ex-officio* trustee, a committee, and a clerk, if appointed, who is to assist in conducting the business, but cannot act or vote in the direction of its affairs. The trustees and committee have power to delegate the business or part of it to the treasurer or any person chosen whenever it is impossible or inconvenient for the committee to meet, but not otherwise, and the fact of such delegation and the time it is to last and its scope are to be recorded in the minute-book. This is the only relaxation from personal discharge of duty where duty is imposed.

The affairs of the Society are to be conducted by trustees, a treasurer, and committee of management, which committee is elected by the members, and this committee, of whom three are to be a quorum, may elect trustees, treasurer, and clerk. One of the principal duties of this committee was to meet weekly to decide on applications by borrowers for loans which were to be made on a prescribed form signed by the applicant, and the committee had power to grant or refuse the application. Two solvent sureties were required for each loan, and the note for it was given in the name of the treasurer, and was repayable by weekly or monthly instalments.

It is, I think, material to ascertain the exact position of the trustees and treasurer as regards the Society; for though the trustees are not I think trustees in the sense, and with the responsibility, that trustees under a deed or will are, they have specific duties assigned to them, for the breach of which if loss happens liability may be attached on them. All the moneys and property of the Society are vested in the trustees for the time

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being for the use of the Society and members thereof, and they may sue and be sued in respect of such property.

By the 40th section of the Act the trustees are directed to cause an abstract of the accounts of the Society for each year to be made out in the prescribed form up to the 31st December, together with a statement of the bonds and effects and property of every kind, and debts and liabilities, and net profit and loss; and a copy of this abstract, duly certified to be correct by the treasurer and at least one trustee, is some time in the month of January in each year to be transmitted to the Loan Fund Board. By the 44th section the Society is directed to reserve a sum not less than one-tenth of their clear net profits to form a fund for the security of the debenture-holders, and subject thereto they may appropriate the residue for the charitable or local purposes mentioned. In this connexion the 20th rule is most important, which provides that the treasurer shall call an annual meeting of the Society on some day in the second or third week of January in each year, for the purpose of inspecting the accounts of the preceding year up to the 31st December, and transacting any other business pertaining to the affairs of the Society; and at this meeting the treasurer is directed to produce a statement of the funds and effects and assets and liabilities of the Society, and an estimate of the clear net profit or loss to that period is to be submitted, together with a detailed account specifying expenditure. Every trustee, member of committee, or debenture-holder to the amount of £25 is to have a vote at such meeting, and the senior trustee present is to be chairman of the meeting and to have a casting vote; and the clear profit of the Society for the past year having been declared and ascertained to be correct, the meeting is to proceed to allocate the reserve fund and any residue of profits as directed by the 44th section.

Under the rules the treasurer is to have the charge and management of the funds and accounts, and he is to be responsible for the sending of this annual abstract in each January.

It will be seen that all these latter directions, designed for the protection of the members, were deliberately and systematically violated by the defendants Roche and O'Brien.

It is admitted that Mary O'Brien, the clerk, got into her

hands and applied to her own use all the funds of the Society. The plaintiffs are owed in respect of debentures and deposits a sum of £410, and there is a total debt under those heads of £2070. The only sums in the hands of borrowers is £15, which is admittedly a good debt, and it is stated, and not disputed, that no loss has occurred in respect of real loans made. All moneys non-existent on foot of the capital and in respect of sums received from borrowers have been misappropriated by Mary O'Brien. She was appointed clerk in December, 1896, but she had been *de facto* clerk for some years before, though her niece Miss Moriarty actually filled the position, and she was implicitly trusted by Dean O'Regan, who was treasurer and manager from 1886 to his death in June, 1898, and also by Thomas Roche and W. J. O'Brien, who were trustees for many years. On 23rd November, 1898, O'Brien was appointed treasurer, and Meagher took his place as trustee. Mary O'Brien did everything. No one doubted her honesty or took the trouble to test it. She assumed the functions of trustees, treasurer, and committee; she invented records of meetings and supplied an imaginary quorum. She deceived by false books and forged, or unreal, vouchers the auditor sent down annually by the Loan Fund Board, and thus substituted in the annual account a fictitious figure for the assets of the Society, which in fact she had appropriated. The inevitable crash came in the summer of 1900.

The Master of the Rolls has arrived at the conclusion that there is no ground even for directing an inquiry against any of the defendants Roche, O'Brien and Meagher in respect of the losses sustained by the plaintiffs, and he sums up the grounds of his judgment as follows:—"Having regard to all the circumstances of the case, the positions in life and *status* of the defendants, their undoubted honesty of purpose, the failure of the plaintiffs to prove anything definite to connect their action with the loss of the funds, and the failure of the public officer appointed and paid for the purpose to afford them any guidance, or to detect and rectify abuses or lax practices, I am of opinion that the action fails."

I have already stated that I think the trustees under the Act are not liable to the extent and in the manner in which trustees under a deed or will would be; nevertheless, if I find that duties

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have been expressly and impliedly created by the Act and rules, and assigned to the trustees and treasurer, and that those duties have been deliberately neglected, and that *prima facie* loss is attributable to their neglect, I think there is ground for directing an inquiry on the terms suggested, and that we are bound to direct it, however much we may regret that officials should suffer who are not alleged to have acted dishonestly.

This question of liability has principally arisen in the case of directors of commercial companies, and I think it is settled that in such a case all that is required of directors, not being trustees in the ordinary sense, is that they shall act of course honestly, and also with such reasonable diligence as ordinary reasonable men under all the circumstances of the case could be expected to employ, and mere imprudence or want of judgment is not enough to make them liable. See *Marzetti's Case* (1), and *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (2); and this last case shows that directors of a building society formed under the Act of 1874, for purposes very like those of Loan Fund Societies, are in the same position as directors of ordinary commercial companies. See also *The Kingston Cotton Mill Company* (3). They are, however, as pointed out by Kay, L.J., in *Re The Lands Allotment Company* (4), constructive trustees of moneys of the Company in their hands or under their control which they wrongly apply. *Dovey* v. *Cory* (5) is a strong illustration of how far directors will be protected who honestly rely on the judgment and information of their responsible officers. There the chairman and general manager, though such officers, were guilty of fraudulent statements. Lord Halsbury puts as the test of liability whether he had exhibited a complete neglect of the duties he had undertaken, and Lord Davey recognises as correct the rule laid down in two cases to which he refers that directors will be liable for paying dividends out of capital—the misconduct there imputed—if they have disregarded the directions laid down in their articles of association in reference to the prepar-

(1) 28 W. R. 543.
(2) 44 Ch. D. 453.
(3) [1896] 1 Ch. 331.
(4) [1894] 1 Ch. 616.
(5) [1901] A. C. 477.

ation of estimates and balance-sheets, and have not exercised thereon any judgment as mercantile men.

The case most like the present is, I think, *Davies' Case* (1), recognised with approval by the Court of Appeal in *Re The Kingston Cotton Mill Company* (2). That was the case of a Savings Bank constituted under the Savings Bank Act, 1863, and rules certified thereunder, and the 11th section of the Act provided that no trustee or manager should be personally liable except *inter alia* for neglect or omission in complying with the rules and regulations required by the Act to be adopted as thereinbefore is provided in the maintenance of checking the audit and examination of accounts, the holding of meetings, and keeping minutes of proceedings thereat. The proximate cause of loss there was the fraud of the actuary, but Stirling, J., held that Davies was liable for misfeasance under the 165th section of the Companies Act by reason of his neglect or omission to comply with the rules of the Company, and he directed an inquiry as to what sum ought to be contributed by him to the assets of the Company. He says, at page 550 :—"Those rules and regulations have to the knowledge of Davies not been complied with, and under these circumstances it appears to me that he has been guilty certainly of omission, if not also of neglect, within the meaning of the statute. That omission or neglect appears to me to constitute a misfeasance or breach of trust within the meaning of section 165, and I think by reason of it there is sufficient *prima facie* evidence to satisfy me that the assets of the bank are less than they ought to have been, and that claims which those assets are insufficient to satisfy may be satisfied in the winding-up. That being so, Mr. Davies may, in my opinion, be properly compelled to contribute an adequate sum to the assets of the Company by way of compensation. It was said on behalf of the respondent that the actuary was a man of high respectability, who enjoyed the confidence not only of the trustees and managers but of all his fellow-townsmen in Cardiff. That appears to me to be no defence whatever. The Legislature has imposed on the trustees and managers this obligation—that not less than two

(1) 45 Ch. D. 537. (2) [1896] 1 Ch. 331.

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persons shall be present on all occasions of public business for the purpose of watching and checking all transactions of deposit and repayment. That duty to the knowledge of Davies was omitted to be performed. What was the object of the double check, for the maintenance of which provision is so anxiously made by the statute? Surely to prevent the bank from being defrauded. How then can it be any excuse for the omission that the transaction of business was entrusted to a single person who to all appearance was worthy of trust? Such persons, as experience shows, not unfrequently yield to such temptations as were offered in the present case, and the possibility of such an event was an evil against which the Legislature desired to guard. Such frauds constitute the very mischief which it was the aim of the statute to prevent."

There is no doubt, I think, that the frauds by which Mary O'Brien got hold of the assets were largely aided by the mode in which the loans to borrowers from the Society were conducted. The form of application for a loan is one prescribed by the Board to be signed by the applicant; but what Mary O'Brien did was to send in one in which she filled in the names of applicant and two sureties who did not sign, and there was a certificate at foot signed in many cases by Roche certifying to the fitness for a loan of the applicant. When it was approved of, the trustees Roche and O'Brien, who had the funds in their names in the bank since the death of Dean O'Regan in June, 1898, gave a bulk cheque to Mary O'Brien in her own name, and she either paid the amount to the borrower or did not. I have no doubt that when there was a real borrower he saw that he got his loan, but there was nothing to prevent the loan being altogether bogus, and even in the case of real loans it appears that she took notes undated, and when they were paid off retained them, so that she was thereby enabled to use them as vouchers for outstanding loans, and in that character they may have done duty more than once to the Board auditor. The office day for payments was Thursday, and it was the duty of the treasurer to attend, and *prima facie* he should have seen to the payment of a loan to the borrower on a proper note, but this was not done, and the practice of paying the moneys of the Society to the clerk was wholly unauthorized and irregular. She has destroyed

all the promissory notes, so that we cannot trace them, and she also tore out from the minute-book the minutes subsequent to November, 1898. If cheques had been drawn directly in the borrowers' names there would have been a security that all the loans were real, and the statements in the annual abstract as to loans issued could have been easily checked.

I have already stated fully the requirements of the Act and rules as to the annual account, and the duties cast upon the trustees and treasurer. The reports for the years 31st December, 1898, and 30th December, 1899, falsely state the amount due by borrowers, and the loans issued during the year, and the gross and net profit. This was of course to conceal the abstraction of the assets. There was no annual or any meeting to consider these reports. Roche signed when the clerk brought them to him. The report was not investigated or in any way examined, and there was no meeting of a committee; nevertheless, Thomas Roche and W. J. O'Brien certify to the accuracy of the account and report of 1898, the former purporting to sign as chairman of a meeting adopting the report as on the 18th January, 1899.

The alleged report and account for 1899 are similarly signed by Thomas Roche and in the same alleged character, but it is not signed at all by O'Brien.

Here we have distinct breaches of the duty imposed by statute and rules, and are we entitled to speculate that if the meetings had been held, and the members had been present with the power of examining the items, and questioning the clerk, and calling for the documents, the frauds might not have been detected and loss averted? It is in this respect that the observations of Stirling, J., in the case of *Re Davies* (1) are so appropriate to the present one. They also meet the argument on behalf of Roche and O'Brien, that the meeting would have had only the materials laid before the Board auditor, and would have been similarly deceived, and also the suggestion that Mary O'Brien was insolvent, and that nothing could have been got from her. I do not think it lies in the mouths of those who have so flagrantly violated the

(1) 45 Ch. D. 537.

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statutory duties imposed for the protection of members to contend that their observance would have been without result.

The duties are imposed as an addition to any check afforded by the Board auditor's inspection. The words of the rule are "ascertained to be correct," that is, there and then by examination at the meeting, and the treasurer is made responsible that the annual abstract is furnished.

It almost follows from what I have said in the case of Roche and O'Brien that no case has been made out against the defendant Meagher. He undoubtedly was trustee, but no violation of the Act or rules has been proved against him, and he only attended, from his appointment in 1898, three meetings. I concur that the action should be dismissed against him, and the appeal disallowed.

I am compelled by the conclusion at which I have arrived in respect of the defendants Roche and O'Brien to consider, as regards Roche, at all events, the validity of the defence raised on the Public Authorities Protection Act. That Act uses very wide language, and though it has been discussed in a considerable number of cases, I am not sure that its scope has been yet judicially defined in such a manner as to furnish a guide in all cases. The language of the Judges in *Ambler* v. *Bradford Corporation* (1) leads us thus far, that the Act must be construed looking to its general scope as expressed in its title, which is: "To generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties," but if the power exists to do the act complained of the defendants will not lose the protection, because they were not bound, but only empowered for their own convenience, to do the act.

In my opinion the Act has no application to such an action as the present, which, so far as material, is one brought by members of the Loan Fund Society against three individual trustees for breach and neglect of duties imposed by the Act for the protection of the members of the Society, by reason of the breach of which loss has been incurred. It is a proceeding within the statutory

(1) [1902] 2 Ch. 585.

trust by the objects of the trust against individual trustees selected as defendants, because they are the persons who did not discharge their duties. The Act will have full scope in the case of the trustees and treasurer of the Loan Fund Society if they for it acting, or intending to act, in execution of the Act, injure outsiders, for instance by seizing the goods of a wrong person, or in an unauthorized manner. The provision about the tender of amends would be apposite in such a case. It is quite clear that the Act could be no protection to the defendants if they had the money of the Society in their hands, and the present case, I think, differs only in degree. This seems to have been the opinion of Kekewich, J., in *The Attorney-General* v. *Company of Proprietors of Margate Pier* (1), though he did not make it the ground of his decision.

I cannot think that the 61st section of the Loan Fund Act, repealed by the Statute Law Revision Act, 1894, would have furnished a defence to the action, and, in my opinion, the substituted general Act does not do so either.

HOLMES, L. J. :—

The Act 6 & 7 Vict. c. 91 was a well-intended, but, to judge by results, a somewhat unsuccessful, effort to combine business and philanthropy. Its object was to form loan societies throughout Ireland which, acting under the inspection and control of a central authority, were to raise by loan from their members and others funds to be employed in lending small sums to the industrious classes resident in their respective districts. A thrifty man looking for an investment for his modest savings would be attracted by a high rate of interest supposed to be secured by State supervision, while he would have the satisfaction of thinking that his money was being used to relieve on reasonable terms the temporary needs of hardworking neighbours, and that the surplus profits of the Society were to be applied to charitable purposes.

The leading feature of the statute was the formation of "The Loan Fund Board" in Dublin, of which the members and officers

(1) [1900] 1 Ch. at p. 752.

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are appointed by the Lord Lieutenant, and the cost of management defrayed by Parliamentary vote. When it is proved to the satisfaction of this Board that a Loan Society is required in a particular district, such Society may be formed by persons willing to give or lend money for the purpose; and its business is to be conducted pursuant to the Act and to a code of rules to be prepared in a carefully prescribed manner. The duty of seeing that these provisions are complied with is imposed on the Dublin Board, which is given authority to inspect from time to time all books, accounts, vouchers, papers, and documents of the local bodies, and is also empowered to direct the dissolution of a Loan Society that has misapplied its funds or done anything contrary to the obligations imposed on it by the rules and statute.

The Mitchelstown Loan Fund Society was formed in the year 1886, and the scheme for its management was very simple. Its debenture capital was not to exceed £3000, and all holders of debentures to the amount of £25, together with such other persons as they might appoint, were to be its members. To them was entrusted the duty of electing a treasurer, two trustees, and a committee, all of whom were precluded from receiving any remuneration for their services.

The committee was to meet every Wednesday for the purpose of considering the applications for loans, and of selecting the persons to receive them. A loan was to be secured by the promissory note of the borrower, and two sureties payable in twenty weeks by weekly or monthly instalments. Fourpence in the £ was deducted in the first instance from the advance by way of discount, while punctuality was enforced by a small fine if the stipulated repayments were not duly made, and in the event of a second default by liability to be sued for the full amount.

The duties of the trustees were almost entirely formal, and responsibility for the moneys of the Society seemed to rest upon the treasurer. He was to have the management of the fund and accounts, and charge of the books. He was to pay all expenses, and to take the necessary proceedings against defaulting borrowers. He was to have an annual abstract of the accounts up to the 31st December in each year prepared and submitted to a

meeting of the members to be held in January. He alone of the unpaid officers was to be *ex-officio* a member of the committee, and to give substantial security to the Loan Fund Board for the faithful performance of his duties. There might even be delegated to him the whole of the business of the Society, when it was impossible or inconvenient for the committee to meet; and he was authorized to appoint a member of the committee to perform the duties of his own office in the event of his being absent. The rules contemplated the appointment of a paid clerk to assist in keeping the books and conducting the other business; but although this clerk was to give security to the Loan Fund Board, he was not entrusted with any authority to act independently of the committee and the treasurer.

The trouble and responsibility imposed upon the last-named officer might at first sight appear too great to be undertaken without reward; but when it is remembered that there was but one office-day in the week, and that probably the office was only open on that day for three or four hours, it will be seen that the work was not of such a nature as to repel a man of energy and public spirit. The operation of the Society was confined within a comparatively narrow compass. The committee on Wednesday settled the persons to receive loans and the sum to be advanced to each. It was only necessary for the treasurer to attend on the following day at the office with the money, pay it to the borrowers in exchange for their promissory notes, receive the instalments then due, and see that entries were made by the clerk in accordance with the very simple system of book-keeping prescribed by the Loan Fund Board. The treasurer and clerk being thus a check on each other, there was no danger in the absence of combined action of any misapplication of the funds.

The principal agent in forming the Mitchelstown Loan Fund was Dean O'Regan, the parish priest. He was treasurer from its foundation until his death in 1898, and during all this period he was its moving spirit. Speaking in June, 1897, he referred to his experience in the working of similar Societies as going back for fifty years, and he bore strong testimony to the benefits conferred by them on the poor. He was evidently a man of masterful character, impatient of interference or criticism, and

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contemptuously indifferent to the regulations to which the Society was subject. From a very early period the Loan Fund under his management became involved in illegalities and irregularities. In 1889 its office, in defiance of one of the provisions of the statute, was situated in a public-house, and notwithstanding repeated remonstrances, this was persisted in for years. On the retirement of Mr. Casey, the first secretary, Miss Moriarty became his nominal successor; but the work was really done by her aunt Miss O'Brien, an arrangement which, in spite of the objection of the inspector, was continued to the year 1896. The wholesome rule that applications for loans should be signed by the proposed borrower was systematically disregarded. We have looked through a large number of these documents, and have found none that was not both filled up and signed in Miss O'Brien's handwriting, while in many the names of the sureties are omitted. It was not unusual that, instead of a quorum of three, as prescribed by the rules, there was only one member present when loans were authorized and other business done at the weekly meetings of the committee.

The most important duty of the Dublin Board is to inspect the local Societies and to audit their accounts. At first this work was done by Mr. Adams, whom a witness describes as careless, and whose reports, if he made any, have not been brought to our notice. He was succeeded by Mr. Young, who seems to have discharged the duty of auditor efficiently, and I have rarely seen such remarkable documents as the letters founded on his reports and addressed by the Secretary of the Loan Fund Board to Dean O'Regan. In the first of them, dated the 27th of April, 1892, the Dean is informed that the books had been kept in such a way "that Mr. Young was wholly unable to check the accounts or test the solvency of the Society," and that it would be necessary to have its affairs wound up by a receiver, unless "the clerk at once arranges to have herself taught her business by Mr. Bowen, and keep with accuracy and regularity a new set of books." On the 8th May, 1894, the Dean was told that the inspector had "found the accounts of the Society in a most unsatisfactory state, showing traces of gross inaccuracy, carelessness, and neglect," and his attention is called to a long list of errors, as to some of

which the inspector's comment is: "I have never in my experience as inspector of Loan Funds met such a state of things as the above." On the 14th October, 1896, it is recorded in the minutes of the Society that an inquiry, directed, I presume, by the Loan Fund Board, had been held in Mallow, at which the chairman condemned the whole working of the Society, of which several specific instances are mentioned. On the 26th May, 1897, the secretary again wrote to Dean O'Regan telling him that the inspector had reported: "The accounts were full of errors and inaccuracies of various kinds. I have been obliged to report a similar state of things at every inspection I have held at Mitchelstown." There are then enumerated in detail many errors and defects. On the 11th May, 1898, another letter to Dean O'Regan informed him that the result of an inspection recently held was to disclose several irregularities and neglects of duty similar to those previously pointed out. During all this time no serious attempt seems to have been made to remedy this deplorable state of things. On the contrary, Dean O'Regan resented the interference of the central authority, professing entire confidence in Miss O'Brien and Miss Moriarty; and at an extraordinary meeting of the members, held on the 2nd June, 1897, the Dean tendered his resignation as treasurer "owing to the high-handed manner in which the Loan Fund Board assumed to rule the affairs of the Society." The meeting, however, "knowing the serious loss such action would occasion, pressed him to consider his decision, and to its entire satisfaction he again consented to act."

It is, I think, much to be regretted that the Loan Fund Board did not preserve the Society from inevitable disaster by dissolving it at an early period of its career. It must have been soon evident that the honorary officers were destitute of business capacity, that the clerk was either incompetent or dishonest, that there was no prospect of amendment, and that sooner or later insolvency must come. After the death of Dean O'Regan in June, 1898, the defendant William J. O'Brien was appointed treasurer; and the business was carried on until the end of the following year.

I presume the annual audit took place in the spring of 1899, but if so, we have not seen the inspector's report. Abstracts of

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the accounts for the years 1898 and 1899, giving a satisfactory statement of the funds and operations of the Society were furnished to the Loan Fund Board, the first being signed by the defendants Roche and O'Brien, the second by Roche alone. After this I find no evidence of the Society doing business, and indeed for some time before its transactions must have been few. Early in 1900 it was known that its capital had disappeared. There are some vague references in the evidence to an inquiry held, I think, in September of that year, by Mr. Scarr on behalf of the Loan Fund Board; but if so, the result has not been stated. No further step was taken until in June, 1901, there was begun this action, in which the plaintiffs, four holders of debentures of the Society, seek on behalf of both themselves and all the other debenture-holders to make four of the officers liable for so much of the funds and assets as have been lost through breaches of trust committed by them. Of the four implicated officers, Thomas Roche was a trustee of the Society during the whole period of its existence; William O'Brien was trustee from the beginning until he became treasurer after the death of Dean O'Regan in June, 1898; John F. Meagher is alleged to have become trustee in succession to William J. O'Brien; and Mary O'Brien has been clerk since 1896.

It has been argued by counsel for the plaintiffs that the legal relation of these officers to the debenture-holders and depositors is that of trustees who *prima facie* are bound to account for the trust funds, and that it is not necessary to show that they were guilty of any specific acts of neglect or malversation. If this be the position of the defendants, the Court would be relieved from the embarrassment caused by the vagueness of the rules and the indefinite character of the evidence—an embarrassment of which Porter, M.R., strongly and, in my opinion, justly complains. Unfortunately I am unable to deal with the case on the basis of trustee and *cestui que trust*. The circumstance that two of the officers of the Society are called trustees in the statute and rules is calculated to mislead. I have already mentioned that the duties of these trustees were of a formal character. The 18th section of the Act and Rule 3, which declare that all property, moneys, and effects of the Society shall be vested in the trustees, must, I think,

refer to the descriptions of property mentioned in rule 21, such as accumulated profits, the interest in a lease of premises, iron safes, office furniture, &c., and does not apply to the funds required or used in the ordinary work of the Society, over which the treasurer was given complete control. It is not alleged that either Roche, O'Brien, or Meagher, in the capacity of trustees, ever received, or consistently with the rules could have received, any of the working capital of the Society; and I do not see how an argument can be founded upon the mere fact of their being called trustees. Section 36 of the Act declares that neither the trustees nor the other officers shall be individually responsible in person or property for payment of the debentures.

The legal position of the defendants as to liability is, I think, the same as that of the officers and servants of every company, firm, or other institution. They are liable—(1) for moneys of their employers received by them for which they are unable to account; and (2) for any loss arising from the negligent discharge of the duties they have undertaken to perform. No claim has been or can be made under the first of these heads against the three male defendants. Obscure and indefinite as the evidence is, it leads clearly to the conclusion that the defendant Mary O'Brien has from time to time fraudulently applied to her own use moneys belonging to the Society, without the connivance or knowledge of its other officers, until at length the whole of its capital was thus misappropriated. This lady, who is described by the Master of the Rolls as being "of highly respectable appearance, intelligent, and of determined and commanding presence," not only held the office of clerk since 1896, but had also done the clerk's work from a much earlier date. She enjoyed the full confidence of Dean O'Regan, who, I doubt not, allowed her to discharge, without any real supervision, most of the work which ought to have been undertaken by himself as treasurer.

Miss O'Brien, in giving evidence at the trial, did not deny that she had misapplied the money, and she swore that it was in the Dean's time that her "irregularities" (as she called them) took place. Although I am not prepared to accept this statement to its full extent, I have little doubt that her malversation began years ago, and that the auditor was deceived by false entries and

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fraudulent vouchers. Indeed, I must assume, in the absence of evidence to the contrary, that to the last the books of the Society contain nothing from which the diminution of its capital could be inferred. In this state of circumstances, while the liability of Mary O'Brien is undoubted, the plaintiffs' right of relief against the other defendants depends as to each of them upon whether the negligent performance of his duty as an officer of the Society enabled her to carry out her frauds. In this, as in every other case in which the cause of action is breach of duty, it is not enough to show general slackness or carelessness. The Court must be satisfied that the alleged loss or damage was the consequence of specific negligence on the part of the person sought to be charged.

Now, as long as Dean O'Regan was the sole treasurer, I can find no evidence of such negligence by any of the male defendants. He, not they, had the control and management of the funds and accounts of the Society, and had charge of its books. He, not they, ought to have paid out the loans to the borrowers, and to have taken possession of the instalments paid in. He, not they, ought to have seen that these transactions were entered correctly in the books. These, as I understand the rules, were matters exclusively within the province of the treasurer with which it would have been an impertinence for the other officers to interfere; and if they had been properly attended to by him the Society could have sustained no loss through the dishonesty of Miss O'Brien. In coming to this conclusion I do not overlook the fact that the defendants Roche and O'Brien were from the first members of the committee, that Roche was the most regular and active attendant, that the principal duty of the committee was to authorize loans, and that its action was marked by the serious irregularities already pointed out. This might be important if any of the loss is to be attributed to the insolvency or default of borrowers, but it has been proved that so far from this being the case, the loans have been repaid with exceptional completeness.

I have thus far considered the liability of the defendants Roche and O'Brien as trustees and members of the committee. Unfortunately for them, however, their connexion with the Society underwent a change in February, 1897.

We have little or no information as to how Dean O'Regan managed the funds while he was treasurer. For at least part of the time he seems to have had no separate bank account for the Loan Fund money, and I know not whether he left it in the hands of Miss O'Brien or mixed it with his own. On the 11th February, 1897, an account current was opened in the Mitchelstown Branch of the Bank of Ireland in the name of Dean O'Regan and the defendants Roche and O'Brien. On the death of the Dean in June, 1898, this account was formally closed; but a new account, which was in reality a continuation of the previous one, was immediately opened in the names of the two survivors, and this account continued to run to July, 1900.

There is no doubt that this was intended to be, and was regarded as an account of the Loan Fund Society. The money required to make advances was to be drawn from it, the money returned by borrowers was to be paid into it. Why the names of Roche and O'Brien were joined to that of the actual treasurer is not explained. It may have been because the Dean was growing old. It may have been because the bank required their security for the overdraft which was contemplated. But whatever was the reason for their joining in this account, I am of opinion that by doing so they assumed the position and duties of joint treasurers of the Society.

The account is a curious one in itself. It was never in funds for an hour. It began with an overdraft of £150, paid out to Miss O'Brien, and the sum overdrawn ultimately exceeded £500. Down to the month of June, 1899, it shows considerable financial activity. All the cheques drawn upon it were signed by Roche and O'Brien, and, with a few exceptions which can be easily explained, were payable to Miss O'Brien the clerk; and it is proved that all the lodgments were made by her. A careful scrutiny of its several items has led me to the conclusion that at no period after it opened was there a sum at all near the full amount of debenture capital employed in the work of the Society; and the reasonable inference would seem to be that before February, 1897, a substantial portion of such capital had been appropriated by Miss O'Brien. On the other hand, I think that this bank account shows that

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in February, 1897, and for more than two years later there was in addition to the overdraft a considerable sum being lent to and repaid by borrowers, from which circumstance I infer that when Roche and O'Brien became *de facto* treasurers there was still intact a portion of the debenture capital which was made away with by subsequent defalcations. I am of opinion that these last-mentioned defalcations could not have taken place had it not been for the negligence of Roche and O'Brien as custodians of the funds. They gave the clerk what money she asked for without seeing to its application, and they maintained no supervision over the moneys she received. In January, 1899, they signed the abstract of the accounts for 1898, as she prepared it, and they permitted this document thus vouched by them to be laid before the Society and the Loan Fund Board. I assume that this abstract embodied what was recorded in the books, but if so, and if I am right in the view that there had then been already large defalcations, the books were falsely kept, and Roche and O'Brien could hardly have failed between February, 1897, and January, 1899, to detect the fraud if they had even occasionally looked at the accounts kept by the person who, on the one hand, was receiving money from them, and, on the other, was lodging money to their credit every week.

The result, therefore, is that while I hold that they are not liable for any moneys lost or misapplied previous to the 11th February, 1897, I am of opinion that they are bound to make good the defalcations of the clerk since that date, and that it ought to be referred to Chambers to ascertain the amount thereof. Inasmuch as for the reasons already stated I regard them as responsible for the abstract of accounts signed by them in January, 1899, I agree with my colleagues that in carrying out the reference this abstract be taken as *prima facie* evidence of the state of the Society's funds at its date, but that each of them, as well as every other interested party, be at liberty to show errors or defects therein.

I have not yet referred to the defendant John F. Meagher, and I have but little to add on the question of his liability. If the view I have taken of the position of Roche and O'Brien is correct, it follows from what I have said that the plaintiffs have failed in their action against Meagher. He reluctantly assented to become

trustee when O'Brien was made treasurer after the death of the Dean, and there is evidence that he attended three meetings of the committee, and that he signed a few applications for loans, but no act of negligence causing loss or damage has been proved against him.

It only remains for me to state in a few words why I reject Roche's special defence founded on the Public Authorities Protection Act, 1893. That statute only applies to acts done, and to neglects and defaults in the execution or intended execution of an Act of Parliament, or of a public duty or authority. I cannot conceive upon what ground it can be argued that a treasurer of a Local Loan Fund Society is acting in execution of a statute, or is performing a public duty, or is exercising a public authority. A few private individuals form themselves into a Society for the purpose of lending money in a certain district subject to rules prepared by themselves, but which must be approved of in the manner prescribed by statute. A public department called the Loan Fund Board is given by the same statute power to inspect the transactions of the Society and to put an end to its operations if it thinks this expedient. The Loan Fund Board and its officers are beyond doubt within the protection of the Act of 1893. They are acting in execution of a statute and in the performance of a public duty. But the officers of the local Society appointed by its members to look after their interests derive their authority from them, are responsible to them for the performance of their duty, and are in no sense public servants, or acting in execution of an Act of Parliament.

Solicitor for the plaintiffs: *D. Callaghan.*
Solicitor for the defendant Thomas Roche: *Anthony Carroll.*
Solicitors for the defendants William J. O'Brien and J. F. Meagher: *James G. Skinner.*

R. D. M.

M. R.
1903.

Feb. 13, 14, 25.

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Will—Construction—"Survivors"—Life estate—Absolute gift—Restriction as to mode of enjoyment—Settlement.

A testator bequeathed to each of his four unmarried daughters £10,000 New 3½ per cent. Government Stock, to be paid on marriage; and £20,000 Old 3½ per cent. Government Stock, to be settled on marriage strictly on each daughter, and on her demise on her lawful issue; and in case any of his four daughters should die without leaving lawful issue, who should attain the age of twenty-one or get married, then her £20,000 Old 3½ per cent. Stock was to be divided between the survivors of his four daughters. The longest liver of the four daughters was a widow, aged eighty-one, without children. On her marriage a settlement was executed, the ultimate limitation of which was to the persons who, by virtue of the will, should be entitled to the same:—

Held, that in the events which had happened, she was absolutely entitled to the £20,000 Stock bequeathed by her father's will, and put in settlement on her marriage.

ORIGINATING SUMMONS.

By his will, dated 14th December, 1841, Robert Fannin bequeathed to certain trustees "£80,000 Old 3½ per cent. Government Stock, and £40,000 New 3½ per cent. Government Stock, now standing in my name and to my credit in the books of the Governor and Company of the Bank of Ireland," in trust "for the uses, purposes, and intents hereafter named, and for no other use, purpose, or intent whatsoever, that is to say, I leave to and bequeath unto each of my four unmarried daughters, viz. Martha, Mary Anne, Margaret, and Catherine Fannin, the sum of ten thousand pounds New 3½ per cent. Government Stock, to be paid and assigned to each as a marriage portion on their respective marriages, and twenty thousand pounds Old 3½ per cent. Government Stock, to be settled on each marriage strictly on my said daughters, and on their demise on their lawful issue, share and share alike, not to be subject in any manner to the control or management of any husband my said daughters may at any time marry; and in case of any of my said four daughters dying

and leaving no lawful issue, to attain the age of 21 years or get married, then such share or shares of twenty thousand pounds Old 3½ per cent. Stock to be divided, share and share alike, between the survivors of my said four daughters." The testator left and bequeathed all the rest, residue, and remainder of his property, real and personal, to his wife for life, subject to the legacies and annuities in his will thereinafter mentioned, and after certain bequests to his trustees and other persons therein mentioned, the testator left and bequeathed all the rest, residue, and remainder of his properties, debentures, funds, and securities, etc., to be equally divided, share and share alike, amongst his then surviving children as residuary legatees.

Robert Fannin died in January, 1842, and his will was duly proved by his widow Mary Fannin and Thomas Butler Stoney, the executrix and executor therein named. His four daughters, Martha, Mary Anne, Margaret, and Catherine, survived testator, and were all unmarried at the date of his death. Mary Fannin, the testator's widow, died in 1865. Catherine Fannin married the Hon. Charles Smyth Vereker on the 3rd May, 1842, on the occasion of which marriage a deed of settlement was entered into, and £20,000 Old 3½ per cent. Stock was settled strictly in accordance with the provisions of the will of Robert Fannin, the ultimate trust being that in case there should be no children of the marriage, or if they should die under age or unmarried, that the said sum of £20,000 Stock should be held in trust "for all and every person or persons who, upon such contingency happening, shall under and by virtue of the provisions and limitations of the will of the said Robert Fannin be entitled to the same."

Charles Smyth Vereker died in 1885, leaving his wife Catherine surviving him. There was no issue of the marriage.

Mary Anne Fannin married Wybrants Olphert, and died leaving issue. Wybrants Olphert was also dead.

Martha Fannin married the Reverend William M'Causland, and died leaving issue. Her husband was also dead.

Margaret Fannin married the Reverend Lord Adam Loftus. Both were dead, and left issue surviving.

Mrs. Vereker was still living, and had attained the age of

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eighty-one. She claimed to be absolutely entitled to the £20,000 Stock settled by her marriage settlement.

The trustees of Mrs. Vereker's marriage settlement issued a summons asking for the determination of the following questions, which arose in the administration of the trusts of the will of Robert Fannin and the trusts of the settlement of 3rd May, 1842, made on the marriage of the Hon. Charles Smyth Vereker and Catherine Vereker :—

1. Whether on the true construction of the gift in the said will contained of £20,000 to each of the four unmarried daughters of the testator, and in the events which have happened, the defendant Catherine Vereker is now absolutely entitled to be paid the said legacy, or the moneys representing the said legacy.

2. Whether upon the death of the said Catherine Vereker without issue the said legacy, or any portion thereof, falls into the residue of the estate of the testator.

Jefferson, for the trustees of the settlement of 1842.

Serjeant Dodd (with him *Donaldson*), for the Hon. Mrs. Vereker :—

The funds of £80,000 and £40,000 bequeathed to his four daughters by Robert Fannin's will are segregated from the rest of the estate for all purposes. The bequests of £10,000 and £20,000 to each daughter are contained in the same disposition and in the same sentence, and both sums are set apart from the rest of the property. There is an absolute gift to each daughter of £10,000, payable on marriage ; and also an absolute gift of £20,000 to each daughter, with a proviso as to settlement on her marriage, and consequently, so far as the settlement has no effect, the previous absolute gift holds good. The gift in the case of Mrs. Vereker is not divested. Her estate is indefeasible because she is the survivor of the four sisters : *Jones* v. *Davies* (1) ; *Eaton* v. *Barker* (2) ; *Harrison* v. *Foreman* (3).

In a limitation of this nature the last survivor takes absolutely.

(1) 28 W. R. 455. (2) 2 Coll. 124. (3) 5 Ves. 207.

Mrs. Vereker in this case is her own survivor. She is the "survivor" within the meaning of the gift. The intention was that a daughter who had no issue should take her £20,000 absolutely if all her sisters have predeceased her. The original gift prevails: *Maden* v. *Taylor* (1); *Davidson* v. *Kimpton* (2); *In re Roper's Estate*; *Morrell* v. *Gissing* (3).

The gift over of the property depends on the contingency of there being a survivor, and if that contingency cannot arise the gift is an absolute gift. That is the principle of *Eaton* v. *Barker* (4) and *Jones* v. *Davies* (5). Here there is a clear absolute gift of £20,000 Stock to Mrs. Vereker in the first instance. It is the case of a testator leaving a legacy absolutely as regards his estate, but restricting the mode of enjoyment by the legatee to secure certain objects. On the failure of such objects the absolute gift takes effect: *Lassence* v. *Tierney* (6); *M'Tear* v. *M'Dowell* (7); *Kellett* v. *Kellett* (8); *Dowd* v. *Dowd* (9); *Duckett* v. *Thompson* (10).

In *King* v. *Frost* (11) the devise to each of the five sons must have been for life only, and consequently the case is distinguishable from the present. See also *Ranelagh* v. *Ranelagh* (12); *In re Mortimer*; *Griffiths* v. *Mortimer* (13); *Askew* v. *Askew* (14).

Henry, K.C., and *Glover*, for Sir John Olphert, representing the residuary legatees of Robert Fannin:—

King v. *Frost* (11) must be taken as settling the law as regards the construction of a limitation of this kind. *Maden* v. *Taylor* (1), *Davidson* v. *Kimpton* (2), and *In re Roper's Estate*; *Morrell* v. *Gissing* (3), were considered in *King* v. *Frost* (11), and were not followed. See also *In re Mortimer* (13) and *Askew* v. *Askew* (14). In *Ranelagh* v. *Ranelagh* (12), Chitty, J., adopts the principle of the decision of the Privy Council in *King* v. *Frost* (11), and reversed his own decision in *Re Roper's Estate*; *Morrell* v. *Gissing* (3).

(1) 45 L. J. Ch. (N. S.) 569.
(2) 18 Ch. D. 213.
(3) 41 Ch. D. 409.
(4) 2 Coll. 124.
(5) 28 W. R. 455.
(6) 1 Mac. & G. 551.
(7) 11 Ir. Ch. R. 338.
(8) L. R. 3 H. L. 160.
(9) [1898] 1 I. R. 244.
(10) 11 L. R. Ir. 424.
(11) 15 A. C. 548.
(12) 41 W. R. 549.
(13) 52 L. T. (N. S.) 383.
(14) 57 L. J. Ch. (N. S.) 629.

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The effect and meaning of the will in the present case is that £20,000 was to be settled on each daughter for life, not to be subject to the control of a husband, and in the case of the death of such daughter without leaving issue, then the fund was to go over. There is no absolute gift to Mrs. Vereker in the first instance, and consequently on her death the £20,000 falls into the residue of Robert Fannin's estate.

As to the question of the vesting of a legacy, see *Atkins* v. *Hiccocks* (1); *Elton* v. *Elton* (2); *Re Cantillons, Minors* (3). In the present case the £20,000 did not vest in Mrs. Vereker till her marriage. The gift is contained in the expression "to be settled on each marriage strictly on my said daughters and their lawful issue." There is no absolute gift in terms, and if so the principle of *Kellett* v. *Kellett* (4) and that class of cases does not apply, but, on the contrary, the case comes within the decisions of *King* v. *Frost* (5) and *Ranelagh* v *Ranelagh* (6).

Donaldson in reply:—

There is an ambiguity in the report of *King* v. *Frost* (5), but it is clear that the original gift in that case was nothing more than a life estate. It was not argued that there was anything more than a life estate given, and the discussion altogether turned on the effect of the divesting clause. The case is treated in Theobald on Wills, pp. 603, 604, as if the preceding gift to the legatee was the gift of a life estate only. *In re Roper's Estate*; *Morrell* v. *Gissing* (7) and *Ranelagh* v. *Ranelagh* (6), were also cases where the original gifts were gifts of life interests. If the Court holds that the original gift in this will was an absolute gift, then the cases show clearly that where there is a limitation of the kind, and there is in fact no survivor, then the absolute gift prevails.

There is an absolute gift here in the first instance. *Atkins* v. *Hiccocks* (1) and the other cases cited as to vesting do not affect the question at issue, because the question is what estate was it

(1) 1 Atk. 500.
(2) 3 Atk. 504.
(3) 16 Ir. Ch. R. 301.
(4) L. R. 3 H. L. 160.
(5) 15 A. C. 548.
(6) 41 W. R. 549.
(7) 41 Ch. D. 409.

that vested on marriage. The fact that the surviving daughters would take accrued shares absolutely shows the intention of the testator to sever this £80,000 Stock from the estate for all purposes, and his intention clearly was that no one should get any benefit from this settled fund save and except his four daughters and their issue.

On the construction of the whole will it is clear that there is first an absolute gift to each daughter, with restrictions added as to mode of enjoyment.

Feb. 25.

THE MASTER OF THE ROLLS (after stating the facts) said:—

The question, then, is whether, in the will of Robert Fannin there is or is not a gift of the £20,000 to each of testator's daughters, with a superadded direction for its settlement on her marriage. Inasmuch as these directions do not, in the events which have happened, cover the whole ground, there is either an absolute interest in Mrs. Vereker under the original gift, or the fund will, after her death, sink into the residue. The latter contention must prevail if Mrs. Vereker took nothing in the fund beyond her life estate. No other point was greatly pressed; although Serjeant Dodd, for Mrs. Vereker, did contend that she might be considered as herself the "survivor" within the meaning of the clause I have read, the case was rested on the other view: and indeed, since *King* v. *Frost* (1), could hardly be treated otherwise. A person is not, and cannot with propriety be described as, his own survivor; and the contention that "survivor" by itself means, in such contexts, the longest liver of individuals or of a class is no longer tenable.

King v. *Frost* (1) is a Privy Council decision, on appeal from the Court in Queensland. It is therefore not, in strictness, a binding authority, as if it had been a decision of the House of Lords in an Irish case. But it is a case of the greatest weight, and was decided by a board, including Lord Watson and Lord Macnaghten, on principles of law identical with our own, and after a review of the cases decided in England. I take it as settling the law, and overruling contrary decisions or opinions. In that case

(1) 15 A. C. 548.

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Lord Macnaghten says :—"Two alternative constructions were put forward. In the first place, it was contended by the principal appellant that the word 'survivor' meant longest liver, and that William, the longest liver of the five brothers, dying without issue, took as tenant in tail the share which had been given to him for life, with remainder to his children in tail, and took it on his own death as survivor. That construction has the merit or disadvantage of being ingenious and comparatively novel. The old reports are full of cases on the meaning of the words 'survivors or survivor.' But this particular construction does not seem to have been discovered until the year 1876, when it was adopted by Jessel, M.R., in *Maden* v. *Taylor* (1). It was said that the introductory words of the accruer clause are applicable to the case of the death of the last brother as well as to the deaths of those who predeceased him. That is perfectly true if you stop there. But if the whole sentence is read together, it is apparent that the introductory words must be qualified by limiting them to the case of the death of a son, leaving one or more of his brothers surviving, or else, if the introductory words apply to every case, that there is no one to take on the occasion of the death of the last survivor of the five sons without issue. Then it was argued on behalf of the other appellants that the survivorship indicated in the accruer clause was either actual survivorship or survivorship in the person of descendants, and that the words 'survivors and survivor' were to be read as 'others or other,' qualified by the condition of real or metaphorical survivorship. That construction may sometimes be required to give effect to a testator's intention; but unless it is required by a clear indication of a scheme of settlement found in the will, it is open to the objection of being at once forced and fanciful."

Those are the observations of Lord Macnaghten, which chiefly concern the present case. It occurred to me during the argument that it might have a bearing on this case to ascertain whether there was an absolute gift in the first instance to the testator's five sons in *King* v. *Frost* (2); and, accordingly, I communicated with the eminent solicitors who were engaged in the case, and they very

(1) 45 L. J. Ch. (N. S.) 569. (2) 15 A. C. 548.

courteously sent me a copy of the will of the testator, James Underwood, and I find that it does not contain any general gift, such as would give a son anything more than a life estate. I was tolerably sure that this was so, but I thought it well to be certain.

In the leading case of *Lassence* v. *Tierney* (1) Lord Cottenham enunciated the rule in the often quoted words:—"There is no doubt as to the rule upon which the principal question in this case —the title to the personalty—must be decided. In this and the many similar cases which have occurred the only question is the application of the rule to the facts. If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee—upon failure of such objects, the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case, the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee. In every case, therefore, the question must be one of construction; and, except for the purposes of such construction, very little assistance can be derived from former decisions. It is, however, obvious that the intention that the gift should be absolute as between the legatee and the estate, is, as in all cases of construction, to be collected from the whole of the will, and not from there being words which, standing alone, would constitute an absolute gift."

In *Campbell* v. *Brownrigg* (2) a testator provided as follows:—"I give and bequeath to my daughter Isabella Hook . . . the sum of 50,000 Sicca rupees, to be employed for her use in the following manner:"—and then followed a direction that the money should be invested, and that the interest on the principal should be paid to the daughter during her life, and that, in the event of

(1) 1 Mac. & G. 551. (2) 1 Ph. 301.

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her marriage and having children, the principal should, after her decease, go to her children. The daughter died without children, and it was held that her personal representative was entitled to the fund. The Lord Chancellor (Lord Lyndhurst) said :— "Isabella Hook the daughter, having died without ever having had a child, the question is, whether her personal representatives are entitled to the 50,000 Sicca rupees invested according to the directions of the testator, or whether this money goes to his residuary legatees. I think the personal representatives of the daughter are entitled to the fund. The testator gives and bequeaths to his daughter 50,000 Sicca rupees; it is to be employed for her use; and he directs in what manner it shall be so employed. It is to be invested by his executors. She is to receive the interest during her life. If she has children they are to divide the principal between them after her death. This is the manner in which the legacy given to his daughter is to be employed for her use. There are no further directions. To this extent the use is controlled, but no further. She takes the gift subject to this restriction : when that ceases, it becomes, or rather remains, by virtue of the gift her absolute unfettered property. Such then is the construction I put upon the bequest, and if I am right in this interpretation, the fund, upon the facts stated, belongs to the petitioner."

In that case there is an express gift of the interest for life.

In *M'Culloch* v. *M'Culloch* (1) there was a gift by a testator of £3000 to a woman with whom he had contracted an invalid marriage, in these terms :—"To Agnes Bland, sometimes called M'Culloch . . . the sum of £3000 sterling, the interest thereof to be for her own sole and separate use during her lifetime, and while she continues unmarried; thereafter, should she marry, the principal sum with the accruing interest thereon to pass into the hands of my residuary legatee." Stuart, V.-C., says :—"The testator, in very plain words, has given the principal sum to the lady in question; and then, for a very intelligible purpose, has directed how the interest shall be applied during her lifetime, and has added words of gift over to the residuary legatee in one event

(1) 3 Giff. 606.

only, viz. that of her marrying again. It is impossible, therefore, to hold that she takes a life estate only, when, if that construction be right, the words import a clear gift of £3000. She has an absolute interest in the principal, with a direction that the interest only shall be applied for her use during her life; because, in the event of marriage, there is a gift over. Until this event happens, or if it never happens, no one but this lady can be entitled to the legacy."

In *Combe* v. *Hughes* (1) Turner, L. J., says:—"The general rule is, that if there is in the first place an absolute gift, and then a series of limitations modifying that gift, so far as the limitations do not extend, the absolute gift remains."

In *M'Tear* v. *M'Dowell* (2) the Lord Chancellor, in discussing the provisions of the will in that case, says:—"The bequest appears to me to come within the principle of *Lassence* v. *Tierney* (3) and other analogous cases mentioned in the argument, there being evidence, on the whole language and construction of the will, of the testator's intention to give the legacy absolutely as between his estate and the legatee."

In *Kellett* v. *Kellett* (4) the principle of *Lassence* v. *Tierney* (3) is adopted and confirmed. Lord Cairns says (pages 168, 169):—"Now, when we turn back to the will, although I have read a portion of it before, I would remind your Lordships of the peculiar manner in which these pecuniary legacies are first mentioned by the testator. The direction of his will is 'to the trustees holding his real estate to levy and raise to and for his daughter Frances, to and for his daughter Henrietta, to and for his daughter Arabella, to and for his daughter Susan, and to and for his daughter Matilda, the sum of £1000 each.' If the will had stopped there, it is perfectly clear that this is an absolute provision and gift to each of his daughters. There is no kind of qualification, and no limitation, making it anything short of a complete legacy in their favour. He does go on to impose promiscuous conditions and limitations afterwards expressed. But what are those promiscuous conditions and limitations? They are conditions and limitations in favour of the

(1) 2 De G. J. & S. 657.
(2) 11 Ir. Ch. R. 338.
(3) 1 Mac. & G. 551.
(4) L. R. 3 H. L. 160.

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husband of each daughter who should marry, in favour of children, in favour of surviving brothers and sisters in the event of the daughter dying unmarried, and in favour of the issue of his other children surviving the daughter who so dies unmarried. But your Lordships well know the general principle applicable to provisions of that kind for children, which cannot be better expressed than it was by Lord Cottenham in the case of *Lassence* v. *Tierney* (1). Referring in that case to a long line of earlier cases of the same kind, Lord Cottenham says:—'If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails.' Therefore, had there been by any circumstances a failure of the specific objects for whose benefit the limitations were engrafted on the absolute gift, in that case the absolute gift to the daughters, or any of them, would have prevailed."

Then, is this provision for daughters an absolute gift with a direction to settle it in a particular way which in the existing state of things does not exhaust the interest? In other words—the words of Lord Cottenham—the question is, "whether the testator intended an absolute gift with directions as to the mode in which the property so given should be enjoyed by the legatee, or that the gift should only take effect in the several cases and for the several purposes specified."

Here several points occur to one in reading the will.

The first and most obvious is, that the gift of the £20,000 each is in the very same sentence grammatically governed by the same verb, as that of the £10,000. It is clear that the testator intended his daughters each to have £30,000, £10,000 in hand in cash, which, unless she chose to settle it herself, would go to her husband as cash on marriage, the remaining £20,000 to be settled on her on marriage. If it were to be supposed that on the death of the survivor without issue her fund was to pass to the residuary legatee, it would follow that if all four daughters had died unmarried, or without issue to take, Mrs. Vereker as "survivor" would

(1) 1 Mac & G. 551.

have taken absolutely her portion of her sisters' original shares, amounting in all to £36,666 13*s.* 4*d.*, but that her own £20,000, bequeathed to her, would pass from her on her death. Of course the same would be to a certain extent the case if only two, or one, predeceased her *sine prole*. It cannot be supposed that this was the testator's intention. Again—and this is perhaps the strongest point—the whole fund, £80,000 Old 3½ per cent. Stock and £40,000 New 3½ per cent. Stock, is taken bodily out of the testator's assets and vested in special trustees. The words "I leave to and bequeath unto each of my four unmarried daughters . . . the sum of £10,000 New 3½ per cent. Government Stock . . . and £20,000 Old 3½ per cent. Government Stock, now standing in my name and to my credit in the books of the Governor and Company of the Bank of Ireland, to be settled on each marriage strictly on my said daughters," are words of clear gift. The £20,000 are not merely given to the trustees on trust to settle, but are given to "each of my unmarried daughters." If the settlements exhaust the whole interest (as is the case with the three who did not survive), then there is nothing more to be said. But when, as in Mrs. Vereker's case, the settlement cannot go beyond her life estate, the construction claimed by the residuary legatees or the children of the other three daughters cuts down the original gift of £20,000 in effect to a life estate. Another point seems to me to be of force as supporting this view. Mrs. Vereker is above eighty-one years old. She might not have married at all. Indeed, none of the four might have married. That is, she has survived her father by some sixty-one years. On the construction contended for she would have had practically no provision under her father's will, at least if the £10,000 would only be payable on her marriage, and the settlement directed in respect of the £20,000 could only operate as of the date of a marriage which never took place. Considering that those four unmarried daughters seem to have been the chief objects of his testamentary solicitude, and remembering the vast fortune of which he was disposing, it is impossible to suppose that such could have been the testator's meaning. If some one had said to him, How are your daughters to live till they marry, and what if they never marry? His answer would have been, "You are under a mistake: I have given them the money; but

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I have also directed a settlement of £20,000 of it to keep that part safe from their husbands when and if they become married women." If I am right in thus reading the will, then till marriage they would have had the income, by force of the absolute gift; otherwise they would have nothing, or, at most, only the income of one-third of the fund left to them.

I said practically "no provision"; for though each daughter receives the sum of £100 yearly till married, that was not intended as a provision for maintenance. It is "to be *dispensed* as they please." In its context this points to its being applied for purposes, whether charitable or not, as they pleased; not in buying bread and coarse clothing for themselves, as they must, if it were their only provision out of this great fortune of their father's munificent bequest.

Solicitors for the trustees: *Thompson & M'Laughlin.*
Solicitors for Sir John Olphert: *Mackay & Company.*
Solicitor for Hon. Mrs. Vereker: *Russell M'William*

R. W. L.

Appeal. 1902.

IN THE MATTER OF BALDWIN'S ESTATE (1).

Feb. 17, 21. *Judgment—Registration—Priority—Charge on land created by will—Put in settlement on marriage of legatee—Interest in land—3 & 4 Vict. c. 105, s. 22—13 & 14 Vict. c. 29, s. 4.*

In 1806 a judgment was recovered against the then owner of the lands for sale in this matter. This judgment was re-registered on June 19, 1875, but was not again re-registered until March 4, 1898. In 1868 the then owner of the lands, subject to the judgment, by his will charged the lands with £8000 for his younger children. The testator died in 1878. One of his younger children, on her marriage, assigned her share of the £8000 to the trustees of her marriage settlement, which was executed on November 21, 1881, more than five years after the last preceding registration of the judgment:—

Held, by the Court of Appeal (affirming the decision of Ross, J.), that the

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L. JJ.

judgment was not postponed to the share of charge so settled by reason of its having been allowed to go out of registration.

Appeal. 1902.

In re BALDWIN'S ESTATE.

APPEAL from an order of Ross, J., dated November 12, 1901, giving the amount due on a judgment for £600, recovered in Trinity Term, 1806, in the Court of King's Bench by George Mansergh against Henry Baldwin, priority as against the proceeds of the sale of the lands of Cloughmacow, sold in this matter, over a sum of £2000, portion of a sum of £8000, charged upon the same lands by the will and codicil of James Baldwin, and settled by a marriage settlement dated November 21, 1881.

Henry Baldwin was at the date of the judgment seized of the lands of Cloughmacow in fee-simple. The judgment was assigned from time to time; and ultimately, by a deed dated March 30, 1898, the judgment and the principal money due thereon were assigned to Ellen Grant, the respondent, absolutely. The judgment was re-docketed or re-registered on the following occasions, and no others, viz.:—October 3, 1851; June 28, 1885; July 2, 1860; August 7, 1868; June 19, 1875; and March 4, 1898. The sum of £276 18*s.* 5*d.* remained due on foot of the judgment.

James Baldwin, who became seized of the said lands, subject to the said judgment, by his will, dated Sept. 8, 1868, devised the same to trustees therein named upon trust to pay an annuity to his widow, and, "subject to any other charges and incumbrances affecting the said lands," upon further trust to raise a sum of £6000, with interest thereon at 5 per cent., for his younger children (of whom Eliza Gore, otherwise Baldwin, was one), to be paid to them in equal shares on attaining their respective ages of twenty-three years, or marriage in the case of daughters. By a codicil to his will James Baldwin increased the said sum of £6000 to £8000. There were four younger children of the said James Baldwin. He died in 1878.

By indenture of settlement executed on the marriage of Eliza Baldwin with Arthur S. Gore, and dated November 21, 1881, in consideration of the therein recited intended marriage, Eliza Baldwin assigned to James Baldwin and John Ellard Gore, as trustees of the settlement, the said charge or sum of £2000, being one-fourth of the said sum of £8000, to hold the same,

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and all moneys to become payable in respect thereof upon the trusts declared by the said indenture of settlement. The entire sum of £2000 and interest thereon remained due to the trustees.

A petition for the sale of the lands having been presented in the Court of the Land Judge, Ross, J., in ruling the final schedule of incumbrances, made an order declaring the judgment entitled to priority over the sum of £2000 put in settlement by the said indenture of November 21, 1881. From this order John E. Gore and James Baldwin, the trustees of the said settlement, appealed.

Matheson, K.C., and *John Leech*, for the appellants:—

This judgment does not affect the lands as against the appellants, as it was not re-registered within five years before the execution of the marriage settlement under which they claim: 13 & 14 Vict. c. 29, s. 4; *In re Perrin* (1).

[Lord Justice Walker referred to *Simpson* v. *Morley* (2).]

The persons claiming under the settlement are purchasers of an interest in the lands to the value of £2000; they could have called for the sale of the lands; the settlement made the charge a charge for value; the appellants have, therefore, an estate or interest in the lands: *Walcot* v. *Smith* (3). No doubt it has been held in *Malcolm* v. *Charlesworth* (4) that a deed assigning a legacy charged on land does not affect the land within the meaning of the English Registry Acts, but that case has been questioned in *Daniel* v. *Freeman* (5); the charge here is secured by a devise of the fee-simple of the lands upon trust to raise the sum of £8000; and where a deed appoints a sum of money, not merely charged on lands, but secured by a term of years, the deed affects the lands within the meaning of the Registry Acts: *In re Jennings* (6); Madden on Registration, pp. 16, 17.

Harrison, K.C., and *D. M'C. Mahony*, for the respondent:—

The will of James Baldwin expressly makes this charge subject to "any other charges and incumbrances affecting the

(1) 2 Dr. & War. 147.
(2) 2 K. & J. 71.
(3) 11 Ir. Ch. Rep. 266.
(4) 1 Keene, 63.
(5) I. R. 11 Eq. at p. 248, *per* Sullivan, M.R.
(6) 8 Ir. Ch. Rep. 421.

lands"; the judgment was originally a charge upon the lands by 3 & 4 Vict. c. 105, s. 22, and by his will the testator re-charges it on the lands. The appellants are not purchasers or mortgagees of an interest in lands within the meaning of section 4 of the Judgment Mortgage Act: *Walcot* v. *Smith* (1) was the case of a legal rentcharge—plainly an interest in lands—besides, it was decided on the Redocketing Act (9 Geo. 4, c. 35), which contains different words. To gain priority over the judgment the deed should be "an instrument vesting or transferring the legal or equitable right to the estate to such purchaser." The trustees of the marriage settlement could not sell the lands without the aid of the Court; as assignees of the charge they had no interest or estate in the lands. *Malcolm* v. *Charlesworth* (2) is rightly decided: it has been followed in *Arden* v. *Arden* (3), after it was observed upon in *Gardiner* v. *Blesinton* (4). The language of Sir W. Page Wood in *Hughes' Trusts* (5) is an express authority that this £2000 charge is not an interest in lands. That case was approved in *Humber* v. *Richards* (6).

LORD ASHBOURNE, C. :— Feb. 21.

An interesting question is raised by this appeal from the decision of Ross, J. In ruling the priorities of the incumbrances affecting the estate, the learned Judge held that a judgment of Trinity Term, 1806, vested in the respondents, though not re-registered in due course, was not postponed to a settlement of 1881, under which the appellants claim as purchasers.

The appellants have argued that under 13 & 14 Vict. c. 29 the settlement was entitled to priority over the judgment by reason of the judgment creditor having omitted to re-register his security during the period of five years next before the date of the settlement, and as the foundation of this argument they have contended that an interest in land was comprised in the settlement to which they became entitled as purchasers.

On the other hand, the respondents urged that this contention

(1) 11 Ir. Ch. Rep. 266.
(2) 1 Keene, 63.
(3) 29 Ch. D. 702.
(4) 1 Ir. Ch. Rep. 64.
(5) 2 H. & M. 89.
(6) 45 Ch. D. 589.

Appeal. 1902.

In re BALDWIN'S ESTATE.

Lord Ashbourne, C.

was based on a misreading of section 4, submitting that the appellants were not within the meaning of that section "purchasers, mortgagees, or creditors," as by the settlement there was vested in or transferred to them no estate or interest in the lands, but only an interest in a charge or chose in action, and that the provisions of the section were not sufficient to displace in favour of such an interest the priority otherwise held by the judgment.

The circumstances connected with the settlement are these: James Baldwin made his will in 1868, and by it devised his lands to trustees in fee-simple upon trust by demise sale or mortgage to raise the sum of £6000 (subsequently increased to £8000), and to hold the same when raised in trust for his four younger children in equal shares. One of these children was married in 1881, and she put £2000, her share of this £8000, into settlement by a deed of 21st November, 1881, and it is not controverted that her interest was an interest for valuable consideration which might be regarded as a purchase. The contest knit between the parties is simply this:—Are the appellants purchasers of a legal or equitable right to an estate or interest in the lands within the meaning of section 4 of the Judgment Mortgage Act (13 & 14 Vict. c. 29)?

Many cases were cited during the argument. One case is to my mind decisive: *Re Hughes' Trusts* (1), a case of the highest authority from the reputation of the Judge who decided it—Vice-Chancellor Page Wood. In that case a petition was presented under the Trustee Relief Act by Thomas Jones, asking for payment out of Court of the sum of £130 and interest out of a fund of £773 0*s.* 1*d.* £3 per cent. annuities which had been paid into Court by the trustees. It appeared that Thomas Hughes, who was entitled as a younger child under his father's marriage settlement to a share of a sum of £2000, became a bankrupt on August 3rd, 1889. By the settlement a term of 500 years had been created, one of the trusts of which was that the trustees should by sale or mortgage of the lands comprised in the term levy and raise or take a sum of £2000 for the younger children. Thus there was a charge of a sum of £2000 on lands under a marriage settlement with a trust term to secure it, practically the same state of circumstances as we

(1) 2 H. & M. 89.

have before us. By a deed of July, 23rd, 1859, Thomas Hughes mortgaged his interest under the settlement in favour of the petitioner to secure £150, but no notice of this indenture was given to the trustees of the settlement. The trustees raised the sum of £2000, and paid the portion of Thomas Hughes into Court. The difficulty from which they claimed relief was this: If the portion of Thomas Hughes was an equitable interest in land, no notice of the mortgage to the trustees was necessary, but if it was a chose in action it remained within the order and disposition of the bankrupt for want of notice to the trustees. It was argued expressly for the petitioner that the portion of James Hughes was an equitable interest in land, and that the doctrine of notice had no application.

The judgment of Page Wood, V.-C., deals with this argument in the clearest manner. He says:—

"I confess my first impression was that this was an interest in the nature of real estate, and if it were an interest in real estate simpliciter, no notice would be required. But having had my attention recalled to the case of *Lee* v. *Howlett* (2 K. & J. 531), which was before myself, and to the grounds upon which I founded my decision in that case, and having carefully reconsidered that decision after the argument in the present case, I see no reason to change the opinion I then formed, and I find it impossible to distinguish the two cases. In *Lee* v. *Howlett* there was property directed to be absolutely sold, which could only reach the persons who made the assignment in the shape of the money, the proceeds of that sale. The person who was so interested had made an assignment, of which the assignee had not given any notice, and the question was between him and a subsequent assignee, who had afterwards given notice to the trustees. It appeared to me in *Lee* v. *Howlett* that, although the precise state of circumstances had not before occurred, the case was, nevertheless, within the principle that the assignment of a chose in action requires notice to be given, in order to establish the priority of the assignee. It seemed to me that a chose in action which, although secured upon land, could never be reached as land by the person interested in it, was a species of property which, according to the decision of the House of Lords in *Foster* v. *Cockerell* (3 Cl. & F. 456), required notice to be given in order to complete the title of the assignees. . . . The only distinction which can be suggested is that in the present case the money is to be raised by sale or mortgage; but even that is not an option which is given to the beneficiary. He has no charge himself, and no benefit can reach him except as so much money to be raised by the mortgage. He has no voice whatever as to how it is to be raised. No doubt, he could file a bill to have the charge raised; but when the charge was raised he

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would have nothing to do with the land. The trustees would have to raise it by sale or mortgage of the land. If it were raised by sale, the case would be identical with *Lee* v. *Howlett*; and if it were raised by mortgage there would be no real difference. I apprehend the test is not whether the charge is to be raised in one way or other, but whether the beneficiary himself has an estate or interest in the land. The trustees were not his trustees in any sense, except as being trustees under the settlement to raise so much money in which he was to share. He would have no actual control, although he might say, 'I have a right to have that money raised,' which right he undoubtedly had. But that is not an equitable estate or interest in the land itself."

The principles so laid down are, in my opinion, sufficient to support the conclusion arrived at by Mr. Justice Ross.

But Lord Justice Walker has called attention to another ground on which the judgment may be sustained. Under section 22 of Pigot's Act the judgment became a charge on the lands themselves. A comparison of the language of the 22nd section of Pigot's Act, and of section 4 of 13 & 14 Vict. c. 29, shows that the latter was passed to guard from the effect of Pigot's Act the interest of purchasers and mortgagees, who might become entitled to an estate in the lands otherwise liable to the judgment during a period which was not covered by re-registration. But here it cannot be contended that the appellants are purchasers of an estate or interest in lands on which the judgment is made a charge by Pigot's Act. They, therefore, do not come within the class for whom the benefits of section 4 were intended. On this narrower ground also I should be of opinion that an effective answer could be given to the appellants' claim. For these reasons, I am of opinion that the judgment of Ross, J., should be affirmed.

FITZGIBBON, L. J., concurred.

WALKER, L. J.:—

This appeal raises a question of priority between a judgment of Trinity Term, 1806, for a penal sum of £600 (Irish) vested in the respondent in the appeal, and the persons claiming as purchasers under a marriage settlement of 21st November, 1881, executed upon the marriage of Eliza Baldwin with Arthur Gore.

The last re-registration of the judgment before the settlement

was on the 19th June, 1875, and consequently the five years provided for re-registry expired on 19th June, 1880. The appellants contend that the judgment did not on the 21st November, 1881, and does not now, affect the lands originally liable to the judgment as against them on the ground that they were and are purchasers within the meaning of the 4th section of the 13 & 14 Vict. c. 29.

The question depends on the character of the interest which is the subject of the settlement, and the true construction of the 13 & 14 Vict. c. 29.

James Baldwin, the father of Eliza Baldwin, by his will, dated the 8th September, 1868, devised his fee-simple estates unto and to the use of two trustees in fee upon trust, at such time or times, by demise, sale, or mortgage, at their discretion, to raise the sum of £6000, increased by a codicil to £8000, with interest at £5 per cent. per annum from the day of his death, and to stand possessed thereof upon the trusts thereinafter declared; and subject thereto, and to any other charges and incumbrances affecting the lands, he devised his estates to his eldest son Henry William Baldwin in fee, and as to this sum of £8000 (as increased by the codicil) he bequeathed the same to and amongst his four younger children in equal shares, the share of a daughter to be payable at twenty-one or marriage, and he directed the trustees of his will to pay and apply the interest or income of the then presumptive share of each child towards his or her maintenance, education, and advancement. The testator died in the year 1878, and Eliza Baldwin attained twenty-one on the 14th October, 1881, and being entitled to a sum of £2000—one-quarter of this £8000—she, by the settlement of 21st November, 1881, put this £2000 in settlement upon trusts under which she and her husband and children became purchasers of it from that date.

The principal question argued before us on behalf of the respondent was that the appellants under the settlement had no equitable estate or interest in the lands, and on this *Hughes' Trusts* (1) was relied on. I have carefully considered that case, and am unable to see any distinction in substance between it and

(1) 2 H. & M. 89.

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the present, and consequently it might be enough to say that on the authority of the decision of the eminent Judge who decided *Hughes' Trusts* (1) the appellants had no equitable estate in the lands; but, in my opinion, the case of the appellants wholly fails upon a narrower ground arising on the construction of the 13 & 14 Vict. c. 29, viz. that the judgment of Trinity Term, 1806, was a charge under Pigot's Act upon lands and estates therein only, and that the saving in the 4th section of the Act for purchasers from the operation of the judgment under Pigot's Act only makes such purchasers *pro tanto* free from the effect of Pigot's Act, and does not give them further immunity. To be protected by the omission to re-register they must be persons who would have been liable under Pigot's Act if the judgment had continued duly registered.

The Judgment Mortgage Act recites the provision of Pigot's Act, whereby (section 22) a judgment was made a charge upon all lands, rectories, advowsons, tithes, rents, and hereditaments of or to which the judgment debtor should at the time of entering up such judgment or at any time afterwards be seized, possessed, or entitled for any estate or interest at law or in equity, whether in possession, reversion, remainder, or expectancy, as if the judgment debtor had power to, and had by writing under his hand agreed to, charge the same; and the 22nd section of Pigot's Act contains a proviso that as regards "purchasers, mortgagees, or creditors" before the Act the judgment should not affect lands, tenements, or hereditaments otherwise than as the same would have been affected by such judgment if the Act had not passed. It is obvious then that the words "purchasers and mortgagees"—the same class as we have to deal with—refer to persons who had acquired for value estates in the lands which otherwise would be liable.

Now the judgment of Trinity Term, 1806, in the present case, had the operation of a charge on the lands as against all owners of them on the 19th June, 1875, and till the 19th June, 1880. Then comes in the 4th section of the Judgment Mortgage Act:—"No judgment . . . which, after the passing of this Act, shall be

(1) 2 H. & M. 89.

registered or re-registered under the said Act of the eighth year of Her Majesty or this Act, shall after the expiration of five years from the date of such registry or re-registry thereof, affect lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a like memorandum or minute as was required in the first instance be again left with such officer as aforesaid, within five years before the execution of the conveyance, settlement, mortgage, lease or other deed or instrument, vesting or transferring the legal or equitable right to the estate or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors, within five years before the right of such creditor accrued." The judgment remains all along a charge on what Pigot's Act had put it, but the obligation is as to a certain class provisionally removed, viz. those who as purchasers within the period uncovered by re-registry acquired for value estates in the lands which had been under the obligation. So that the question is really reduced to this—whether the judgment under Pigot's Act originally affected an interest such as Emily Baldwin put in settlement. If it did not—and clearly it did not—the saving could not be intended to create an exemption in her favour: so that treating the original obligation and the saving from it as dealing with the same class of liability, we are remitted to the question whether the judgment under Pigot's Act operated as a charge on an interest such as Emily Baldwin had. I think it clear that it did not, and on this short view, which is more satisfactory as being based on the construction of the Act itself, I think the order of Ross, J., must be upheld, though this was not apparently the ground argued before him. In this connexion I may refer to sect. 12 of the Judgment Mortgage Act, which provides that no judgment shall operate or be deemed to have operated as a charge upon any estate, interest, or title in or to lands vested in a mortgagee or as security for money, or any sum or sums of money (except rents and rentcharges) charged upon or payable out of lands, tenements, or hereditaments, and consequently Emily Baldwin's charge is in the very words of the Act excluded from the liability and any exception from liability, and is outside the scope of the Act altogether.

It was not argued before us that the appellants could sustain

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their appeal on the ground that they were "creditors" protected by the saving; and though *Simpson* v. *Morley* (1) was referred to by the Court during the argument, no contention founded upon the doctrine there enunciated was put forward. I am not to be taken as suggesting that there was any ground for it.

I think the appeal should be dismissed.

HOLMES, L. J., concurred.

Solicitor for the appellants: *E. C. Jameson.*
Solicitors for the respondent: *Thomas Exham & Sons.*

G. Y. D.

Ross, J. 1903. April 21.

IN THE MATTER OF THE ESTATE OF HENRY OWEN LEWIS AND ARTHUR FRANCIS OWEN LEWIS AND JAMES MOORE AND JOHN W. JOHNSTON, OR SOME OR ONE OF THEM, OWNERS; EX PARTE ELIZABETH KIRKE, WIFE OF WALTER KIRKE, PETITIONER.

Mortgagor and mortgagee—Petition by incumbrancer—Amount of interest payable to incumbrancer—Statute of Limitations (3 & 4 *Wm.* 4, *c.* 27), *s.* 42.

In an incumbrancer's petition matter, an incumbrancer who avails himself of the proceedings is not entitled to receive interest on his incumbrance which has accrued more than six years next before the filing of the petition for sale, such interest being barred under sect. 42 of 3 & 4 Wm. 4, c. 27.

Lloyd v. *Lloyd* ([1903] 1 Ch. 385) only applies to a proceeding in the nature of a redemption suit.

ALLOCATION.

Alfred E. Goodbody appeared at No. 6 on the Final Schedule of Incumbrances in respect of a judgment obtained in the Queen's Bench Division on the 15th of May, 1889, for the sum of £215 9*s.* 4*d.*, which was registered as a judgment mortgage on the 22nd of April, 1893. This charge only affected an undivided moiety of premises in North King-street, Dublin, part of the lands

(1) 2 K. & J. 71.

for sale, in which Henry Owen Lewis took an absolute interest. Mr. Goodbody had filed a petition for sale on the 14th of August, 1893, and on the 21st of August a conditional order for sale was made. Owing to a difficulty in serving the conditional order on some of the owners in that matter, and who were not named as owners in the present matter, the order was not made absolute. The present petition was filed on the 30th of March, 1899, and the order for sale was duly made absolute; the matter registered as a *lis pendens* on the 24th of August, 1899. The petitioner in the present matter had been paid off in July, 1901, but as the rental had been settled, the solicitors of the petitioner were continued as the solicitors having carriage with the consent of the parties interested. Mr. Goodbody vouched his claim before the Examiner for £215 9*s.* 4*d.* principal, and £113 12*s.* 7*d.* interest from the 15th of May, 1889, to the 15th of January, 1903. The matter came before the Court for allocation on the 20th of January, 1903, but was adjourned pending the publication of the report of *In re Lloyd*; *Lloyd* v. *Lloyd*, subsequently reported in [1903] 1 Ch. 385.

Maxwell, for the solicitor having carriage:—

Mr. Goodbody cannot recover more than six years' interest next before the filing of this petition on his incumbrance, under sect. 42 of the Real Property Limitation Act, 1833. The reasoning in the recent case of *In re Lloyd*; *Lloyd* v. *Lloyd* (1) does not apply to the case of a claimant who asks to be paid here in a matter instituted by an incumbrancer's petition. If it were an owner and petitioner matter different considerations would apply. After an order for sale is made absolute it enures for the benefit of all incumbrancers, to prevent multiplicity of suits: *In re Colclough's Estate* (2); *In re Nixon's Estate* (3). The filing of a petition for sale by an incumbrancer is a proceeding to recover money charged on land within sect. 8 of the Real Property Limitation Act, 1874: *In re Stinson's Estate* (4). In *Archdall* v. *Anderson* (5), which was an action instituted by a mortgagee to

(1) [1903] 1 Ch. 385.
(2) 8 Ir. Ch. R. 330.
(3) I. R. 9 Eq. 7.
(4) 29 L. R. Ir. 490.
(5) 25 L. R. Ir. 433.

Ross, J. 1903. *In re* Owen Lewis' Estate.

raise the amount due to him, and in which, the plaintiff having been paid in full, the Court directed an inquiry as to the other incumbrances, it was held that the coming in of an incumbrancer under General Order 102 of 1843, was tantamount to his bringing a suit under sect. 42 of 3 & 4 Wm. 4, c. 47; and the Vice-Chancellor pointed out that "if it were not so, the absurd consequence would follow that the plaintiff in an incumbrancer's suit would alone be barred of more than six years' interest, while every other incumbrancer paid off in the suit would be entitled to an unlimited amount of interest" (page 438). Ord. XXXIII., R. 7, now regulates the practice formerly regulated by Order 102. In *In re Lloyd*; *Lloyd* v. *Lloyd* (1), it was pointed out by Stirling, L.J. (at page 403), that the mortgagees there were not proceeding by "distress, action, or suit," but, on the contrary, the proceedings were taken by the legal personal representative of the mortgagor, upon whom a Court of Equity had the power to impose terms as to the price of the relief which it might see fit to give. It is true that the owner makes the application here, but that does not make him the party who applies by "distress, action, or suit."

Jonathan Pim, for Mr. Goodbody :—

The application here is made by the owner, and consequently *In re Lloyd; Lloyd* v. *Lloyd* (1) applies. The owner who claims the residue has no right to say that the incumbrancer should not be paid in full. It has never been decided that every creditor in an administration suit, every incumbrancer, is to be looked upon as a person who has brought an action or suit. The Vice-Chancellor in *Archdall* v. *Anderson* (2) did not so decide. In *In re Lloyd; Lloyd* v. *Lloyd* (1), if the mortgagee had made the application the matter would have been different. What is the meaning of a proceeding enuring for the benefit of all? It cannot be said that all are to be regarded as having brought substantive actions. Reliance cannot be placed here on an inchoate suit between the owner and an incumbrancer. According to *In re Lloyd*; *Lloyd* v. *Lloyd* (1), the owner could not take the case out of Court

(1) [1903] 1 Ch. 385. (2) 25 L. R. Ir. 433.

without paying all arrears. A man must have the intention of being a suitor to come within section 42, otherwise people could be put in that position without their knowledge and against their will; so it follows that the present proceeding is not an action or suit by the incumbrancer, but arises out of a suit instituted by someone else. The words "other proceedings" are not mentioned in section 42. The word "suit" must be construed strictly, and does not include an implied suit.

Maxwell, in reply :—

In *Lloyd* v. *Lloyd* (1) the fact that the money was in Court was a mere accident. The petition here is in the nature of a creditor's suit, and not of a redemption suit.

Ross, J. :—

The law is definitely settled by the recent case of *Lloyd* v. *Lloyd* (1). Everything depends on the nature of the proceedings. If the proceedings are in the nature of a suit by the mortgagee to raise his money, the statute applies. If, on the other hand, the proceedings are in the nature of a redemption suit brought by the mortgagor, the statute does not apply. The point I have to decide is a small one. Mr. Maxwell appears for the solicitor having carriage. He is an officer of the Court, entrusted with the conduct of the *sale*. He applies for the allocation of the money realized by the sale. It is his duty to see that it is properly applied, and to give the Court the assistance necessary for so doing.

It is admitted by Mr. Maxwell that the owner urged the solicitor having carriage to have the matter argued, as it was not material to the prior incumbrancer to argue it; he will be paid in full in any event. I must look upon him, therefore, as applying for the solicitor having carriage. We have here a representative action. It is not the case of a plaintiff asking for relief for himself alone, but of a petitioner asking for relief for himself and all the other incumbrancers. When the order is made absolute it

(1) [1903] 1 Ch. 385.

Ross, J.
1903.

In re OWEN LEWIS' ESTATE.

enures for the benefit of all such incumbrancers. Are the other incumbrancers not to be looked upon as plaintiffs? I think they are. I agree with the judgment of the Vice-Chancellor in *Archdall* v. *Anderson* (1), where he says, in reference to another representative action:—"The practice has since always been to consider the coming in of an incumbrancer under this order as the bringing of a suit for the purposes of the statute. If it were not so, the absurd consequence would follow that the plaintiff in an incumbrancer's suit would alone be barred of more than six years' interest, while every other incumbrancer paid off in the suit would be entitled to an unlimited amount of interest." The incumbrancer here has taken advantage of the proceedings, and has proved his claim. I cannot see in the present allocation anything in the nature of a redemption suit by the owner. The mortgagee is in the same position as the petitioner, who has directly invoked the aid of the Court to realize his mortgage.

The statute, therefore, applies, and the mortgagee will receive only six years' interest.

Solicitors having carriage: *A. D. Kennedy, Son, & Figgis.*
Solicitor for Mr. Goodbody: *Goodbody & Tisdall.*

W. C. S.

(1) 25 L. R. Ir. at page 438.

CONNOLLY *v.* KEATING (No. 1).

(1893. No. 1026.)

M. R.
1903.
April 27.

Settlement—Settled land—Tenant for life—Title—Incumbrances—Conveyance—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *sect.* 20, *sub-sect.* 2 (ii.).

By will, dated October 17, 1854, a testator resident in Scotland devised his real estate, including the lands of B. in Ireland, to his six daughters for life, with remainders over. Testator died in 1857, having, prior to his death, advanced the sum of £1500 to the husband of one of his daughters, and £475 to the husband of another daughter. In 1882, by deed of family arrangement, the real estate of testator was conveyed to trustees, to hold on the trusts of the will, charged, as to the life estates of the two daughters therein, with repayment of the sums of £1500 and £475 advanced to their husbands respectively. An order was subsequently made for the administration of testator's real and personal estate in Ireland, and the lands of B. were sold to a purchaser:—

Held, that the sums of £1500 and £475 were not money "actually raised" within the exception to section 20 of the Settled Land Act, 1882, and that the persons who together constituted the tenant for life of the settled lands could convey to the purchaser discharged from these two sums.

SUMMONS.

Daniel Collins, of Bathgate, Linlithgow, N.B., by his will, dated October 17th, 1854, devised his real estate, including the lands of Boytonrath, in the county Tipperary, to his six daughters for life, with remainders over. Prior to his death, which occurred on September 19th, 1857, the testator advanced the sum of £1500 to the husband of one of his daughters, and the sum of £475 to the husband of another daughter. In 1862 proceedings were instituted in Scotland for the purpose of appointing a judicial factor to manage the estate of the testator, and the real estate was vested in a judicial factor. In 1882 the appointment of the judicial factor was recalled, and by deed of family arrangement the real estate of the testator was conveyed to trustees to hold upon the trusts of the will, charged as to the life estates of the two daughters, to whose husbands loans had been made, with repayment of the sums of £1500 and £475 respectively.

An order was made in the Chancery Division in Ireland by the

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CONNOLLY *v.* KEATING.

Master of the Rolls for the administration of the real and personal estate of Daniel Collins; and, by order dated 24th January, 1898, the lands of Boytonrath, as portion of his real estate, were ordered to be sold by public auction, subject to conditions of sale. At the sale Patrick Ryan was declared the purchaser at the price of £2315, which sum was paid into Court to the credit of the action.

The question arising for determination was, whether the persons who together constituted or had the powers of a tenant for life under the settlement subsisting in respect of the property sold could, notwithstanding section 20, sub-sect. 2 (ii.) of the Settled Land Act, 1882, convey the settled property comprised in the lots sold to Patrick Ryan, discharged from the charges of £1500 and £475.

D. F. Browne, K.C., for the plaintiff, having carriage :—

The incumbrances which a conveyance by a tenant for life is prevented from overriding under the provisions of section 20 of the Settled Land Act, 1882, include only such as are created for securing money of which the advance takes place at the date of the deed creating the charge for securing the money. This is the grammatical construction of the words used in sub-section 2 (clause ii.) of section 20.

Leech, for the purchaser :—

It is very doubtful whether a conveyance by a tenant for life under the Settled Land Acts can override a charge upon the life estate created by such tenant for life for the purpose of securing a debt then owing by him or her or by another person in whom the tenant for life is interested. The purchaser cannot be advised to accept the title in this case without a decision on the point. Under the provisions of section 20 of the Settled Land Act of 1882 the conveyance of the tenant for life is effectual to pass the land conveyed, discharged from all limitations of the settlement, and from all estates, interests, and charges to arise thereunder, subject to certain exceptions, including "all such . . . estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed." It is submitted that this is equivalent to *money actually owing or raised at or before the date of the deed* creating the claim; if so, the

charges now in question would lie within the exception, and title cannot be given without the concurrence of the chargeants. No distinction on principle can be drawn between a mortgage to secure money actually owing at the date of the mortgage and money the payment of which takes place on the occasion of the mortgage. The expression "money raised at the date of the deed" includes money which at the date of the deed has been raised. In *Sebright's Settled Estates* (1), North, J., says that in his opinion the words in question include all estates and interests created subsequently to the settlement for the purpose of securing money. That expression of opinion is considered in *Cardigan* v. *Curzon-Howe* (2) by Chitty, J. The purchaser in this case is quite satisfied if the Court decides in favour of plaintiff's contention.

THE MASTER OF THE ROLLS:—

I do not pretend to have any very clear view as to the meaning of the section, but I think I am bound to put the literal and grammatical construction on the words used, leaving the responsibility with the Legislature.

Section 20 of the Settled Land Act, 1882, provides:—"On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold" and soforth, "convey or create the same by deed for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge." The tenant for life in this case has therefore power to deal with the whole interest, the subject of the settlement, that is the fee-simple. What then is the effect of the deed by which he deals with the property? Sub-sect. 2 says:—"Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed . . . discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of (1) all estates, interests, and charges having priority to the settlement; and (2) all such other, if any, estates, interests, and charges as have been conveyed

(1) 33 Ch. D. 429, 438. (2) 40 Ch. D. 338.

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or created for securing money actually raised at the date of the deed." The question then is, whether the words "actually raised" must refer to money paid at the time of the execution of the deed or extends to the case of a charge created by deed in respect of a debt of earlier date, and for money due antecedent to the date of the deed. In this particular case the property was incumbered by deed of family arrangement in 1882, at which time nothing was raised as matter of fact. There has been no money raised since the date of the settlement, and, taking the words "actually raised" literally, they do not apply to the present case.

That is the literal construction of the words of the section, and there is no interpretation clause and no judicial decision that I can find suggesting any other. Therefore the conveyance by the tenant for life to the purchaser can be made discharged from the incumbrance created by the deed of 1882, because the facts do not bring it within clause (ii.) of sub-sect 2 of section 20.

Solicitor for the plaintiff: *J. P. Connolly.*
Solicitors for the purchaser: *Magee & Lahiff.*

R. W. L.

M. R. 1903. April 21. May 5.

CONNOLLY *v.* KEATING (No. 2).

(1893. No. 1026.)

Vendor and purchaser—Sale by Court—Damage to property after sale—Claim for compensation after conveyance.

A purchaser of house property sold by auction by order of the Court, and in possession of a caretaker appointed by the receiver, complained in his requisitions on title of damage to the premises after the sale, and claimed compensation. He afterwards got possession, and accepted a conveyance on a subsequent date, but did not withdraw his claim for compensation:—

Held, that the acceptance of a conveyance was not, in the circumstances of the case, a bar to the claim for compensation, and that as proper care had not been taken of the premises by the receiver between the date of the sale and the time when the purchaser took possession, the purchaser was entitled to compensation.

This was an application on behalf of Patrick Mulcahy, the purchaser of the premises known as the Glengall Arms, in the town of Cahir, county of Tipperary, being lot 4 of the property sold by order of the Court in this action, that out of the purchase-money paid into Court for the said premises he might be allowed a proper sum for compensation in respect of waste and dilapidations occurring to and upon the premises after the sale and prior to possession thereof being given to the purchaser, and for loss arising from delay in the completion of the sale.

The premises formed part of the estate of Daniel Collins, deceased, and were held in fee-simple. They were described in the particulars as the Glengall Arms, and looked on as the hotel of Cahir, situated in the best part of the town. At the rere of the hotel were two large lock-up yards and a garden, also a large store, which would let at £20 per annum, the garden being an excellent one. It was stated that immediate possession of the lot would be given to the purchaser. The premises were put up for sale by auction in the town of Tipperary on November 2nd, 1901, when Patrick Mulcahy was the highest bidder at the sum of £1350. The sale to him was confirmed by the Court on November 7th, 1901, he having, in compliance with the conditions of sale, paid one-fourth of the purchase-money to the auctioneer on the date of the auction, and on November 19th, 1901, the balance of the purchase-money was lodged in Court pursuant to the seventh condition, which provided that each purchaser was to pay the amount of his purchase-money (after deducting the amount paid as a deposit) into Court to the credit of the cause, on or before the 19th day of November, 1901, and if the same was not then paid, then the purchaser was to pay interest on his purchase-money at the rate of 5 per cent. per annum from the 19th November, 1901, to the day on which the sum was actually paid. Upon payment of the purchase-money in manner aforesaid the purchaser was to be entitled to possession, or to the rents and profits as from the said 19th day of November, 1901, down to which time all outgoings were to be paid by the vendor. The eighth condition provided that if any error or misstatement should appear to have been made in the particulars, such error or misstatement was not to annul the sale, or entitle the purchaser to be discharged from

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his purchase, but a compensation was to be made to or by the purchaser, as the case might be, and the amount of such compensation was to be settled by the Judge at Chambers. The fifteenth condition provided that if the purchaser should make any objection or requisition which the vendors should be unable or unwilling to comply with, the vendors should be at liberty, with the sanction of the Judge, and notwithstanding any intermediate negotiation on the subject of such objection or requisition, to rescind the sale, whereupon the purchaser should be entitled to the return of his deposit, but should have no claim for interest, costs, expenses, or compensation.

Upon the investigation of the title serious defects and difficulties arose (1), the removal of which involved much trouble and delay; possession was not taken by the purchaser until July 17th, 1902, and the conveyance was not executed until October 24th, 1902. The purchaser had inspected the premises shortly before the auction, and complained that proper care had not been taken of the premises after the sale, and that he had suffered loss to the extent of £100. In the first set of requisitions on the title, dated December 12th, 1901, his solicitor gave notice to the vendors' solicitor that he would seek compensation for the injury to the premises. A caretaker appointed by the receiver was in possession of the premises since October 28th, 1901. The receiver and caretaker denied that proper care of the premises had not been taken, and deposed that the premises were in a dilapidated state before the sale, as was well known to the purchaser. The purchaser also alleged that he had suffered considerable loss owing to the delay in completion of the sale, that he had taken the premises with the design of using them as a hotel, to which a shop would be attached, in which he would carry on a grocery and spirit business, but that the passing of the Licensing Act (Ireland), 1902, had precluded him from getting any license except a hotel license. Those allegations were, however, denied by the vendors, who said that no business had been carried on upon the premises, and that the license had been allowed to lapse, and that they had facilitated the purchaser in his applica-

(1) See *Connolly* v. *Keating* (*No.* 1), ante, p. 352.

tion for a public-house license, but that the magistrates had refused the application. The other facts of the case are stated in the judgment of the Master of the Rolls. The application was made in the first instance at Chambers, when the Master of the Rolls refused the application; an application was then made to the Judge in Court.

Carrigan, for the purchaser:—

The purchaser is not precluded from compensation by having taken a conveyance; a claim for compensation was made in the requisitions, and was not withdrawn or waived. The sale here was by order of the Court, who should keep faith with the purchaser, and see that he gets the premises in the same state as when they were advertised for sale. [He referred to the following authorities: *Cann* v. *Cann* (1); *Bos* v. *Helsham* (2); *Turner and Skelton* (3); *Palmer* v. *Johnson* (4); *Clarke* v. *Ramuz* (5); *Wilson and Stevens* (6); *Young and Harston* (7); *Horner* v. *Williams* (8); *Phelps* v. *White* (9); *Re Dwyer* (10).]

H. Morgan Byrne, for the vendors:—

The ruling made in Chambers ought to be adhered to. Everything depends on the facts of the case: *Clarke* v. *Ramuz* (5). This is not a case of misdescription of premises. The purchaser did not rely on the claim made in the requisitions. He was aware of the condition of the premises before and after the sale, and he could have got possession earlier if he wished. [He cited *Thomas* v. *Powell* (11); *Irish Land Commission* v. *Maquay* (12); Sugden's Vendors and Purchasers (14th ed.), p. 549.]

THE MASTER OF THE ROLLS:— May 5.

The acceptance of a conveyance does not of itself bar a claim for compensation if the damage was not known to the purchaser

(1) 3 Sim. 447.
(2) L. R. 2 Ex. 72.
(3) 13 Ch. D. 130.
(4) 13 Q. B. D. 351.
(5) [1891] 2 Q. B. 456.
(6) [1894] 3 Ch. 546.
(7) 31 Ch. D. 168.
(8) Jones & Cary, 274.
(9) 7 L. R. Ir. 160.
(10) [1901] 1 I. R. 165.
(11) 2 Cox, 394.
(12) 28 L. R. Ir. 342.

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at the time. A deficiency of acreage, or a misstatement of head-rent payable out of the premises—or of a rent receivable from an under-tenant, only discovered after the conveyance—may be the subject of such a claim. But where the damage or inaccuracy had existed and was known, or ought to have been known, to the purchaser, the acceptance of a conveyance is very good evidence of a waiver by him of any right to damages in the nature of compensation.

But while this is the general rule, the inference of waiver will not arise if the other facts show that the claim is not meant to be waived; for instance, if it is mentioned and insisted on before the deed is executed under such circumstances as to exclude the idea of an intention not to persist in the claim.

The claim in the present case is twofold: first, for delay; and, second, for dilapidation.

As to delay, the purchaser has no claim; for, although there was a long period between the contract (2nd November, 1901) and the conveyance (24th October, 1902), that is, in my opinion, fully accounted for by the very great difficulty in showing title. The requisitions of the purchaser necessitated two several applications to the Court for orders under the Settled Land Act. One of the vendors was a lunatic under the care of the Lord Chancellor. A more difficult case to work out I have seldom seen, though the title was a perfectly good one. There was no contract to convey by a particular date. There was no default by the vendors; and the purchaser was over and over again offered possession (to enable him to procure a license for the premises) without prejudice to any question of title; and he took possession on the 17th July, 1902, without a conveyance.

Whether he would have been discharged from his purchase on equitable terms had he applied to the Court, I cannot actually decide; but it is my opinion that he would. He did not then, however, wish to be discharged; and having held on to his bargain, I cannot hold him entitled to damages for delay under the circumstances. The particulars and also the conditions of sale entitle him to immediate possession had he chosen to take it.

The claim for dilapidations is, however, on a different footing. It is an undoubted fact that the premises were in a very dilapidated

condition, to the knowledge of Mr. Mulcahy, before he bid for them. But that is not the question. He must show that he did not get what he bought.

There were in the two drawing-rooms mantelpieces, and these were removed before the sale on the 2nd November by some one. The correspondence between the solicitors seem to state and admit that they were taken out and sold by "one of the young Keatings," that is, by a defendant or by a member of the defendants' family. I am satisfied by the affidavit of Colonel Massy the receiver that they were not in the place on the 2nd November. Though the evidence is not satisfactory as to when they were removed, they were there not long before that day.

Now, if the purchaser's claim is not barred by accepting the conveyance (which I shall consider presently), is he entitled to compensation for these articles?

In the case of a private sale out of Court, in the absence of warranty or fraud, I think he should be held to his bargain—obtaining the estate as it stood when the hammer fell. But in the case of a sale under the Court, particularly where there is a receiver, I think that the purchaser is entitled to expect that he will get that which the Court ordered to be sold; that is, that the fabric at least will be preserved as it stood, allowing for wear and tear and inevitable accident. I believe that he bought in that expectation and belief; and that, apart from his having taken his conveyance and its operation as a waiver of claim, that good faith which always attends sales by the Court would entitle him to be compensated.

There is a conflict of evidence as to the existence of dilapidations caused by trespassers after the sale and before possession. I think there is not much satisfactory evidence on this head—save that Maher the caretaker used some of the roof-timbers of an outhouse for firewood. But I think there was some damage caused by defective care and watching; and although soldiers dancing in the place might not do much harm, they would not at least improve it. As the vendors are trustees for the purchaser after the sale and the payment of his money, they are bound to take reasonable care of the premises. The case is not like *Clarke* v. *Ramuz* (1), where

(1) [1891] 2 Q. B. 456.

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no care was taken by the vendor; but I think sufficient care was not taken unless Mulcahy's affidavit is a tissue of falsehoods, which I cannot hold.

But then the question arises, does the conveyance bar the purchaser?

On the summons in Chamber I thought it did, on the clear ground that it was evidence of a waiver of claim. Mr. Carrigan has brought the present application, relying on requisitions not mentioned on that occasion.

In the first requisition the purchaser's solicitor says—"These requisitions are also sent expressly without prejudice to the right of the purchaser to claim and recover compensation for dilapidations committed upon the premises, the subject-matter of the sale, since the purchaser agreed to purchase said premises."

This would not include the mantelpieces if the vendors' view of the facts were correct, as I think it is, but, as shown by the correspondence, it was intended to include the claim in respect of them, and was so understood.

The second requisition refers to delay but not to dilapidation.

The third set of requisitions refers to the delay on the 22nd January, 1902, as to which I have expressed my opinion; and indeed there was no delay at that time at all. What then is the effect of the conveyance? I cannot hold that it was intended as an abandonment of the purchaser's claim, formally put forward and never withdrawn. There is no evidence of such withdrawal; and though Mr. Connolly, the vendors' solicitor, may not have considered that any demand for damages was left open, no statement appears to have been made to that effect—"Observe that your taking this conveyance will be relied on as a waiver of the claim you have put forward for damages." On the whole, I think that the case, as now presented, must be decided in the purchaser's favour: and I shall award him, without any reference, £50 in all, to cover all the dilapidations, and to include his costs.

Solicitor for the vendors: *J. P. Connolly.*
Solicitor for the purchaser: *John O'Dwyer.*

W. L.

IN RE WAHAB AND CLENAGHAN'S CONTRACT.

(1903. No. 207.)

V.-C.
1903.
May 6.
June 18.

Lease with covenant by tenant not to alienate without the consent of landlord, and if he did so, to pay an additional rent—Order fixing fair rent—Right to sell discharged from liability for additional rent—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *ss.* 1, 21—*Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33), *s.* 1.

A lease, made in 1875, contained a covenant by the lessee not to alienate without the consent of the landlord, and if he did so to pay an additional rent. After an order had been made, under the Land Law (Ireland) Acts, 1881 and 1887 (44 & 45 Vict. c. 49; 50 & 51 Vict. c. 33), declaring that the lessee was to be deemed a tenant of a present tenancy in the holding, and fixing the fair rent thereof, the tenant ageeed to sell subject to the fair rent. Notices were served pursuant to section 1 of the Act of 1881. No claim or objection was made by the landlord:—

Held, that the tenant could, without obtaining the consent of the landlord, sell the holding discharged from liability for the additional rent.

The principles on which *In re Wright and Tittle's Contract* (29 L. R. Ir. 111) was decided held to apply.

ADJOURNED SUMMONS.

Catherine Wahab advertised for sale by public auction on the 20th December, 1902, all the estate and interest in part of the lands of Feriskill, known as Mossvale, in the county of Longford, her property, held for a statutory term under the Land Law Acts, at the judicial yearly rent of £122, under order of a Land Sub-Commission, varied on appeal by consent to the said sum.

The conditions of sale provided (amongst other matters) that—(5) The title should commence with the will of William Wahab, the husband of the vendor, and the order of the Sub-Commission fixing the fair rent at £120, varied on appeal on consent to £122 by order of the Land Commission, dated the 15th December, 1896, and no objection or requisition should be made by the purchaser in respect of the earlier title, whether same appeared in the abstract of title by recital or otherwise, or not; (8) The title of the landlords should be absolutely admitted,

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and no objection or requisition should be made in respect thereof, nor should the earlier title be in any respect inquired into.

Hugh Clenaghan became the purchaser at £1550.

An abstract of title was furnished, the title being as follows:—

By lease, dated the 7th April, 1875, James Hamilton and others demised to William Henry Wahab the lands in question, containing 92A. 1R. 23P. Irish plantation measure, for thirty-six years from the 1st November, 1874, at the yearly rent of £138. The lease contained a clause of re-entry in default of sufficient distress for the said rent, or if all the covenants by the lessee therein contained were not observed; and William Henry Wahab for himself, his heirs, executors, administrators and assigns, covenanted with James Hamilton, &c., to pay the said rent of £138, and keep the premises in repair, &c.; "and, further, that no part of the above mentioned premises shall be set, let, sublet, aliened, sold, or disposed of by the said William Henry Wahab, his executors, administrators, or assigns, without the consent in writing of the said hereinbefore mentioned lessors respectively, their respective heirs or assigns, first had and obtained; and that if the said William Henry Wahab, his executors, administrators or assigns, do or shall set, let, or sublet, alien, sell, or dispose of the said hereby demised premises, or any part thereof, without such consent first had and obtained, then the said William Henry Wahab, his executors, administrators, and assigns, and also the person or persons to whom the same shall be so set, let, sublet, aliened, sold, or disposed of, shall and will from the time of such setting, letting, subletting, alienation, sale, or disposition, pay unto the said hereinbefore mentioned lessors respectively, their respective heirs and assigns, the additional yearly rent or sum of one pound sterling by the acre, Irish plantation measure, for every acre or fraction of an acre of said hereby demised premises so set, let, sublet, aliened, sold, or disposed of, said additional rent to be payable on the like days and times, and recoverable by the like ways and means as is hereinbefore provided for the payment and the recovery of the said hereinbefore mentioned yearly rent or sum of £138."

William Henry Wahab died on the 28th December, 1893,

having bequeathed all his personal estate to his wife Catherine Wahab, and appointed her executrix. She obtained probate on the 16th March, 1894.

On the 28th July, 1896, a Land Sub-Commission made an order under the Land Law (Ireland) Acts, 1881 and 1887 (44 & 45 Vict. c. 49; 50 & 51 Vict. c. 33), declaring that the lessee was to be deemed a tenant of a present tenancy in the holding, and fixing the fair rent at £120.

Both landlords and tenant required the case to be reheard, and by order, dated the 15th December, 1896, the Land Commission on consent varied the fair rent fixed at £120 to the sum of £122.

Notice of intention to sell was given to the landlords, who took no action with respect to same.

After the sale notice of the name of the purchaser and of the consideration agreed to be given was served on the landlords. They made no objection.

One of the requisitions on title was:—7. The purchaser requires vendor to obtain the written consent of the landlords to the sale in order to relieve the purchaser from any liability to the penal rent under the covenant restraining alienation in the indenture of lease of April 7th, 1875.

The reply was—This is being attended to. See 8th condition of sale.

The vendor endeavoured to procure the consent of the landlords, but ultimately failed to obtain it.

Some correspondence took place, the vendor's solicitor contending that the landlords' consent was unnecessary, on the ground that a fair rent having been fixed, section 1 of the Act of 1881 applied, and the covenant as to the penal rent was void, and relying on the case of *In re Wright and Tittle's Contract* (1). The purchaser declined to complete without the landlords' consent, having regard to the covenant to pay the additional rent.

This was an application by Catherine Wahab under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), for an order that the 7th requisition on title had been sufficiently answered by her, and that a good title had been shown.

(1) 29 L. R. Ir. 111.

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S. L. Brown, K.C. (with him *T. J. Atkinson*), in support of the application:—

The consent of the landlords to the sale is not now necessary; the covenant as to the additional rent is no longer enforceable, and good title can be given subject only to the fair rent: *In re Wright and Tittle's Contract* (1). That case has never been questioned, and the principles upon which it was decided are applicable to the present: see the judgment, p. 117. If the landlords' consent were still necessary, the provisions of the Land Law Acts with respect to freedom of sale would be defeated. The lease contains not only a covenant to pay the penal rent, but a clause of re-entry on breach of any of the covenants; and, accordingly, if that covenant were held to remain in force, the result would be that, notwithstanding the rights conferred by the statutes, no person could buy unless he were satisfied to pay £92 per annum over and above the fair rent. That is just as much a prohibition against alienation as the bald covenant in *In re Wright and Tittle's Contract* (1); it is in effect an absolute prohibition against alienation; and on the principles applied in that case, it is, as a covenant which prevents the right of sale, void after a fair rent has been fixed.

Bates, K.C., and *James Henry*, for the purchaser:—

We do not question *In re Wright and Tittle's Contract* (1), but here the lease contains two independent covenants—first, an absolute covenant against alientation without consent, which we admit has now ceased to be effective; secondly, a covenant to pay an additional rent—not on every alienation—but on an alienation without consent. This is an important distinction. In his judgment in *In re M'Naul's Estate* (2), Fitz Gibbon, L.J., points out (p. 125) that the covenant there was not a covenant prohibiting alienation; on the contrary, it permitted alienation on the terms of paying the additional rent. The reply to the 7th requisition conceded the value of the objection, and the failure to obtain the consent of the landlords shows that they would enforce the penal

(1) 29 L. R. Ir. 111. (2) [1902] 1 I. R. 114.

covenant if they could. The Act of 1887 places the lessee in the same position as if his lease had expired. Section 21 of the Act of 1881 preserves in that case the covenants so far as applicable to tenancies from year to year, and the liability to a penal rent is not inconsistent with the incidents attached to such tenancies, including that of the fixing of a fair rent under the Acts: see *O'Connor* v. *Smith* (1), and the judgment there (p. 400) of Fitz-Gibbon, L.J. A covenant restraining or qualifying the right of alienation is applicable to a tenancy from year to year: see *Meath* v. *Megan* (2); and, unless the covenant here is so repugnant to the incidents imported by the statutes as not to be able to stand with them, it remains in force; but no such repugnance is shown to exist.

The fair rent was fixed as the return for the use of the holding under and according to the contract of tenancy, and before there had been any breach of covenant; it was in substitution for the original rent reserved, and could not include any return with respect to the penal rent, and the old tenancy and that term of it continued to exist: see *Knox* v. *Baxter* (3). In *Pakenham* v. *Williamson* (4) the receiver's fees were held to be part of the original rent reserved for which the fair rent became substituted.

Brown, K.C., in reply:—

For the purposes of the present case there is no difference between a covenant against alienation and a covenant against alienation except on payment of a penal rent, and the Act of 1881 destroys the right to recover such a penalty. In *O'Connor* v. *Smith* (1) the additional rent was for breach of a covenant with respect to cultivation, but that covenant was not inconsistent with the provisions of the Land Law Acts; a covenant against alienation is so. *Meath* v. *Megan* (2) only decided that a covenant against alienation is not inconsistent with a tenancy from year to year, and that the assignor there was not a tenant within section 1 of the Act of 1881, and that therefore that section did not apply.

(1) 20 L. R. Ir. 393.
(2) [1897] 2 I. R. 39, 477.
(3) 19 L. R. Ir. 460.
(4) 30 L. R. Ir. 292.

V.-C. 1903.

In re Wahab and Clenaghan's Contract.

June 18.

The Vice-Chancellor :—

This summons was issued by the vendor to obtain a decision respecting a sale of certain leasehold lands of the plaintiff that the 7th requisition of the purchaser on the abstract of title has been sufficiently answered by the vendor, and that a good title has been shown. The 7th requisition was in the following words. [His Lordship read the requisition.] The reply to this was in the following words. [His Lordship read the reply.]

The question arose upon a lease dated 7th April, 1875, from James Hamilton and others, whose estate is now vested in the plaintiff, to William H. Wahab, for thirty-six years from the 1st November, 1874, at £138 a-year, containing the following covenants [see the covenants set out *supra*].

By an order of the Sub-Commission of the Irish Land Commission, dated the 28th July, 1896, they fixed a fair rent on this holding of £120 a-year, which was subsequently raised by the Land Commission to £122 a-year, and it was thus brought under the Land Acts.

I had occasion to consider an important case closely connected with the present arising on these Acts in the year 1892, when I held that where a fair rent has been fixed under these Acts a covenant or condition against subletting or assigning without the consent of the landlord is inoperative, and the consent of the landlord is not required in case the tenant shall assign or sublet, even though the lease contains a clause of forfeiture on his so doing. I held that it would be contrary to the policy of these Acts to give them this operation, and that the landlord's consent was no longer necessary. This case, decided over ten years ago, has not ever been appealed from, nor, so far as I am aware, quarrelled with judicially. I may take it therefore as correct till it is overruled, and that it applies to all similar cases. But here it was sought to distinguish it from the present by this difference: that there the performance of the covenant was sought to be secured by a clause of forfeiture, whereas here it is by providing for it by a reservation of a largely increased rent in case of breach of the contract. I must consider this reservation as a penalty on the tenant, and not as an equivalent for increased value, of which

there was none. It was, in my opinion, plainly an intended protection against that which is made unlawful by the terms of the contract of tenancy, and against which the tenant expressly covenants. It comes therefore within the principles on which I decided the case of *In re Wright and Tittle's Contract* (1), and I feel bound to hold that it cannot be distinguished in principle from it.

I therefore hold that the 7th requisition has been sufficiently answered by the vendor, and that a good title to the said lands has been shown.

I must order that the costs of this matter be paid by Hugh Clenaghan.

Solicitor for the vendor: *John Wilson.*
Solicitor for the purchaser: *Joseph Allen.*

D. M'C. M.

(1) 29 L. R. Ir. 111.

Ross, J.
1903.

Feb. 25–27.
April 16.

IN THE MATTER OF THE TRUSTS OF THE WILL, DATED THE 7TH SEPTEMBER, 1879, OF CHRISTOPHER NEVILLE BAGOT, DECD. BETWEEN JOHN CHRISTOPHER BAGOT, PLAINTIFF, AND ARTHUR WHITE, WILLIAM FRY, ALICE EMILY WYNNE ROBERTS, CATHERINE MEAGHER, THE REPRESENTATIVE BODY OF THE CHURCH OF IRELAND, WILLIAM HUGH NEVILLE BAGOT, JOSEPHINE ISABELLA BAGOT, GEORGE HINDS BAGOT, BERNARD WILLIAM NEVILLE BAGOT, AND MILO VICTOR NEVILLE BAGOT, DEFENDANTS.

Priority—Claimants on rents collected—Distribution according to equities arising after collection.

Prior to the appointment of a receiver over the lands of A, B, and C, the trustees for the infant owner, tenant in tail, had collected certain rents. R., an annuitant, whose annuity, though not in arrear when the rents were collected, was in arrear when the application was made to the Court, was the first chargeant on A and B. Upon C an incumbrance for £25,000, the interest on which was in arrear at the date of the collection of the rents, and still in arrear, was the first charge. The trustee applied to Ross, J., by originating summons, for directions as to the application of the rents:—

Held, that they should be applied having regard to the equities affecting them when the matter was brought before the Court on summons, and not when they were collected, and consequently that R. should be paid the rents arising out of A and B, and the incumbrancer for £25,000 those arising out of C.

ORIGINATING SUMMONS, by permission of the Court, brought by John Christopher Bagot, trustee of the will of Christopher Neville Bagot, for the determination, under Order LV., R. 4 (*a*) (*e*) (*f*) and (*g*) of the Rules of the Supreme Court (Ireland), 1891, of the following questions:—

1. Is the plaintiff at liberty out of the sum of £1433 16*s.* 6*d.* in his hands as such trustee to appropriate the sum of £500, or any and what other sum, in or towards the expenses of the maintenance and education, or otherwise for the advancement or benefit of the late minor Milo Victor Neville Bagot?

2. If the plaintiff is at liberty to make such appropriation as above mentioned, can he lawfully apply any portion of the sum so appropriated in or towards the payment of the costs incurred by and on behalf of the said late minor in the proceedings now pending for the sale of the land devised by the will of Christopher Neville Bagot?

3. If such appropriation is lawful, how should the residue of the said sum of £1433 16*s.* 6*d.* be applied and dealt with?

4. If such appropriation is unlawful, how should the said sum be applied and dealt with?

5. How should the costs of and incident to this application be borne or provided?

The summons was grounded on the affidavit of the plaintiff, which stated that he was the sole trustee of the will of Christopher Neville Bagot in the title hereof referred to, having been appointed trustee thereof in the room of William Eden Holmes, and jointly with Bernard William Bagot, by deed dated the 20th February, 1897. Bernard William Bagot died on the 22nd January, 1899. The real estate devised by the will was, as hereinafter stated, the subject of proceedings for sale in this Court. John Lloyd Bagot and Thomas Edward Lloyd Neville Bagot, his eldest son, who were first and second tenants for life of the mansion-house and demesne lands of Aughrane under the will of Christopher Neville Bagot, died prior to the appointment of the plaintiff as trustee. Upon the death of Thomas Edward Lloyd Neville Bagot the trustees or trustee of the will became entitled, under the provisions thereof, to enter into possession and receipt of the rents and profits of the mansion-house and demesne lands of Aughrane during the minority of the defendant Milo Victor Neville Bagot, the first tenant in tail male under the will. William Eden Holmes and Bernard William Bagot, the trustees, entered into possession thereof, and received the profits thereof, and subsequently John Christopher Bagot, on his appointment as trustee jointly with Bernard William Bagot, and afterwards as surviving trustee, continued to manage the property down to the appointment of a receiver by the Land Judge on the 10th July, 1899. Milo Victor Neville Bagot attained the age of twenty-one years in the year 1901. There remained in the hands of the surviving trustee John

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Christopher Bagot, the plaintiff, the sum of £1433 16*s.* 6*d.*, being the rents and profits of the real estates of Christopher Neville Bagot collected during the years 1898 and 1899, and prior to the appointment of the receiver; of this sum £663 13*s.* 7*d.* consisted of the surplus moneys received for the grazing of the demesne lands of Aughrane after payment of all expenses of management, and the balance consisted of the rents and profits of the remaining lands of the estate after payment of outgoings and the annual sums and interest payable thereout. At the death of Christopher Neville Bagot the only charge or incumbrance affecting his said estate was an annuity of £1000 to Mrs. Wynne Roberts; this was paid by the trustees, and they also paid the interest on the mortgages created under the powers conferred by the Bagot Estate Act, and the annual sum bequeathed to Mrs. Meagher, to the gale day preceding the appointment of the receiver. When the receiver was appointed there were considerable arrears of interest due to William Hugh Neville Bagot, and of the annuity due to the Representative Church Body. No interest had been paid on the two sums of £5000 and the sum of £10,000 bequeathed by the will. Save a sum of £70 paid towards the maintentenance and education of Milo Victor Neville Bagot in the year 1897 out of the profits of Aughrane, no other sum was paid for his benefit. Milo Victor Neville Bagot had by his guardian incurred certain costs principally in opposing the appeal of William Hugh Neville Bagot to the Court of Appeal; and the plaintiff was desirous of applying towards these costs and otherwise for the benefit of Milo Victor Neville Bagot £500, portion of the sum of £663 13*s* 7*d.*

In opposition to the proposed application, Mr. John R. Lloyd, of the firm of Messrs. Moore, Keily, & Lloyd, solicitors for William Hugh Neville Bagot, filed an affidavit setting out that under section 3 of the Bagot Estate Act, 1881, all the lands comprising the estate for sale in the Land Judge's Court in the matter of the estate of Milo Victor Neville Bagot, owner, Arabella White, petitioner, and of Milo Victor Neville Bagot, owner, William Hugh Neville Bagot, petitioner, were charged with payment to William Hugh Neville Bagot of the sum of £25,000 with interest from the 22nd of April, 1880, at 3 per cent. That

by the order fixing priorities the charge of £25,000 was No. 5 in the schedule to the order, and when the rents referred to in the originating summons were collected there were large arrears of interest thereon to the amount of £8276 7*s.* 6*d.* That the only charges prior to the charge for £25,000 in the priority order were: (1) the annuity of £1000 to Mrs. Wynne Roberts; (2) the annuity of £200 to Mrs. Meagher; (3) arrears amounting to £400 of an annuity of £100 to the Representative Church Body; and (4) the costs mortgages for £6600 and £6000. At the date of the appointment of the receiver the only arrears on foot of these charges were those on the annuity to the Representative Church Body. Mr. William Hugh Neville Bagot consequently claimed that the sum of £1433 16*s.* 6*d.* should be applied in payment of the arrears of interest on his charge of £25,000; that the owner not having, under the order of the Court of Appeal of the 20th of June, 1900, been allowed any costs against the estate, should not be entitled to the sum of £500, or any portion of the sum of £1433 16*s.* 6*d.*, and that the payment of the £70 was improper, and should be disallowed. The provisions of the will of Christopher Neville Bagot and of the Bagot Estate Act are fully set out in *In re Bagot's Estate*, reported in [1900] 1 I. R. 496. This was on the hearing of the motion fixing priorities. Mr. Justice Ross had settled the priorities; his order was varied by the Court of Appeal (see pp. 504–534) and restored by the House of Lords, reported *sub. nom. White* v. *Bagot* in [1901] 1 I. R. 529. When the matter came subsequently before the Court for directions to the receiver, consequent on the result of the appeal, Mrs. Wynne Roberts, who had been declared in the original order to be entitled to the charge affecting only certain specified lands (and which she had not applied to vary), applied for the first time for a declaration that her annuity was a specific charge on all the testator's real estate; or, in the alternative, that she should be entitled to the benefit of his will, by which the testator in effect charged his debts on all his property other than Aughrane; or, in another alternative, that the real and personal estate should be administered in the Land Judge's Court. Mr. Justice Ross decided that the effect of the covenant in the deed of 1876 was to create a debt within the meaning of the earlier portion of the will, which was, with the

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other debts, charged on the testator's real estate other than Aughrane. See the judgment below (1).

Poole, for the plaintiff:—

The trustee could only apply for the maintenance of the minor up to £500 per annum. Under the terms of the will the balance was to go to the accumulating fund. But there has not been collected any accumulating fund.

(1) Ross, J.:—

This is an application on the part of Mrs. Roberts on the occasion of the settlement of a priority order. The application is made at a very late period in the proceedings.

An ordinary order was made by this Court on the 31st March, 1900. In the notice of motion on which this order was grounded, and in this order itself, Mrs. Roberts' charge was set out as first in the schedule, with a note appended that her charge only affected the lands set out in the first part of the second schedule. No notice of motion was served on her behalf to vary the schedule to the notice of motion.

An appeal was taken from the order, and it was varied in one important particular by the Court of Appeal. The House of Lords did not agree with the decision of the Court of Appeal, and restored the original order. It then came before this Court to frame an order for the direction of the receiver, having regard to what had occurred. Then, for the first time, Mrs. Roberts appeared, and raised the question I have now to dispose of.

Notwithstanding this delay, which has subjected all parties to inconvenience and expense, I think she cannot be debarred from putting forward her contention.

On the 19th December, 1876, a deed of separation was executed by Christopher N. Bagot and Mrs. Bagot, now Mrs. Roberts, and by others to make provision consequent on the separation. The deed contains a covenant on the part of the husband, so long as the wife shall live, to pay to her for her separate use the sum of £1000 annually. By another deed executed on the same day, as a further security, the husband specifically charged the annuity on certain lands, namely, those set forth in the first part of the second schedule to the order. These lands having proved insufficient, her contention now is that she is entitled to a specific charge on all the testator's real estate; or, in the alternative, to take the benefit of his will by which he, in effect, charges his debts on all his property other than Aughrane; or, in another alternative, to have the personal and real estate administered in this Court.

To take these applications in inverse order. As the lands have not yet been sold, and as this Court is not equipped with the proper machinery for

Law, K.C. (with him *Longfield*), for Milo Victor Neville Bagot :—

This money should go to the late minor, Milo Victor Neville Bagot. The trustees were in possession of the rents under the minority clause in the will : see the clauses in an ordinary strict settlement : 3 Davidson, p. 272.

This shows the trustees are recognised as standing in the position of the minor when they receive the rents. They were

a heavy administration action, I refuse to order an administration of the assets of the testator. It is not admitted that the personalty has been properly disposed of. I now come to the second contention. I have in my former judgment given my reasons for holding that in this will the words charging the rents, interest, and dividends, and other annual proceeds of the real and personal estate, must be taken to affect the *corpus*. As no personalty is forthcoming, his debts, whatever they were, are thrown on the real estate. The covenant creates a liability, but as it was not broken at the time of his death, it has been contended that it is not a debt within the meaning of the will.

The weight of authority goes to show that when debts are expressly charged by a will *future debts arising out of a previous liability are included.*

The case of *M'Carthy* v. *Clerke* (32 L. R. Ir. 75) merely decides that debts under the 11 Geo. 4 and 1 Wm. 4, c. 47, must be debts that accrued in the lifetime of the covenantor.

Mr. Justice Andrews, in his learned judgment in commenting on the case of *Morse* v. *Tucker* (5 Hare, 79), directs attention to the distinction. A charge of debts created by the testator's will, he says, is an entirely different question.

This would end the matter were it not for the insertion of the words "save as hereinafter mentioned" immediately after the word "debts." This leads us to expect that later in the will the testator will declare that some debt or debts are to be treated in a different way from his other debts which are charged on the blended fund. We find, however, that the will mentions no debt by name, and the natural inference is that he may have intended to make an exception, and that he omitted or forgot to carry out his intention.

No doubt a meaning, if possible, must be put upon every word of a will, but if something is excepted that is hereafter to be mentioned, and if nothing of the kind is mentioned, it is absurd to seize upon some words obviously inserted for a different purpose, and to force upon them a meaning never contemplated by the testator.

The words relied upon are—"I hereby declare that my wife shall not be entitled to dower or thirds out of any of my estates whatsoever, and inasmuch

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by-gone rents and bound by the trusts; and as the mortgagees did not appoint a receiver they are not entitled to claim these rents. The fact that their application is the subject for decision in this Court makes no difference, for the matter before the Court is not *Bagot's Estate*, but this summons brought by the trustee. The trustee represents Milo Victor Neville Bagot. What are the trusts under which the rents when received are to be held?

First, to manage the property and then to pay for the advancement of the minor a sum varying from £200 to £500 per annum, and then to add the balance to the accumulating fund. The fact that the accumulating fund was to cease after twenty years should not affect the trusts. Nothing is said about the date when the rents were to be collected. Milo Victor Neville Bagot comes in as the third tenant for life under the will. At the expiration of the period of the accumulation the estates are to be settled to the same uses as the lands of Aughrane. The accumulating fund is

as a separation is arranged between us, and in the deeds already drafted relative thereto I have provided for my said wife, I feel it quite unnecessary to make her any bequest, but I declare that this my will is to be in no degree considered as contingent on the completion of the said deeds before my death, but is to be of full validity, whether they are or are not completed."

These words are plain and simple. He has provided for his wife, or intends to provide for her, by the two deeds. One creates a specific charge by way of further security. The other creates an obligation superior to any bequest under his will. She is excluded from any dower, or thirds, or any bequest, but there is nothing to indicate that if the obligation he has undertaken results in a debt, such debt is to be treated in a different manner from any other debt.

I now come to the next alternative, that I should declare the annuity to Mrs. Roberts to be a specific charge on all the testator's real estate.

I must now briefly consider the liability to debts of real estate in the hands of heir or devisee. Originally at common law the lands were free unless in the hands of an heir who was expressly bound. The statute of William and Mary extended the remedy to lands in the hands of devisees, and made various changes.

By 11 Geo. 4 & 1 Wm. 4 the heir and devisees were made personally liable for the debt, but the lands *bona fide* alienated before action brought were to be free. Then came 3 & 4 Wm. 4, c. 104, which says that all the fee-simple lands are to be equitable assets for the payment of debts.

still a charge upon the estates, and comes to Milo Victor Neville Bagot without attention being paid to the trusts for building because he is the owner of the estate.

In *In re Bowes*; *Earl Strathmore* v. *Vane* (1), it was held that a bequest of money to be laid out in planting trees on an estate of which the testator was tenant for life was primarily for the benefit of the owners for the time being, and to belong to the persons entitled to the estate absolutely. It is submitted that the fund should be held for that purpose, and should not be paid out at present: see also *Adams* v. *Lopdell* (2). Here the expenditure is to be made for the benefit of the estate, and there is no trust for the mortgagees. It is submitted that if the parties are not now in a position to say what is to be done with the money, there is nothing to divert it from the trusts declared concerning it. The necessity for their consent is admitted, but if they will not consent the money must be used for building: see Ashburner on

and are to be liable in the same manner as the lands were liable for the debts for which the heir was bound. It is plain that there is no specific charge until a judgment or decree is obtained. Before such judgment or decree is obtained the lands can be the subject of *bona fide* alienation, either in the form of out-and-out sale, or in the form of a legal or equitable mortgage: *British Mutual Investment Co.* v. *Smart* (L. R. 10 Ch. 567). It was only in the argument of counsel for Mrs. Roberts, in reply, that a decree creating a specific charge was asked for. There has been no opportunity on the part of William Hugh Neville Bagot of contending that the charge effected by the Act of Parliament does not take priority over the lands specifically affected by such a decree. I decline for the present to make any such decree. This is without prejudice to any application or contention Mrs. Roberts or any other party affected may put forward on the occasion of the ruling of the final schedule.

The result, therefore, is that the annuity is primarily payable out of the lands specifically charged by the deed, and that any deficiency is to be treated as a debt under the will, which, in effect, falls upon the real estate other than Aughrane.

As I have already indicated, Mrs. Roberts' delay has put the parties to great inconvenience and expense, and I therefore will allow her no costs of this motion. The other parties who have appeared are to have their costs with their respective demands.

(1) [1896] 1 Ch. 507. (2) 25 L. R. Ir. 311.

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Mortgages, p. 183. The trustee here claims to exercise his discretion, and the Court will not restrain the exercise of it: see Lewin, p. 690. When the trustee has paid the £500 the balance should be held upon the separate credit of the trust for building.

Jellett, K.C. (with him *Gerald Fitz Gibbon*), for William Hugh Neville Bagot:—

Mr. Law's contention is that his client, the owner at the foot of the incumbrancers on the estate, is entitled to all the money. This is contrary to the agreement for the compromise, ratified by the Act of Parliament. The third clause of the compromise provides that the estates of the testator are to be charged with the sum of £25,000 for the minor William Hugh Neville Bagot, and interest payable thereon until he attained the age of twenty-one years. We submit that the agreement for the compromise and the Act of Parliament are to be read together, and that all parties agreed that the trustees were to be trustees of the composite document, the will and the Act of Parliament. Section 18 sets out the persons who are to be bound by the Act.

Lord Macnaghten, in his judgment in the House of Lords (unreported), says:—"When the compromise was sanctioned by the Act of Parliament the executors were just as much trustees for the widow and her solicitor as they were trustees for any beneficiary under the will."

They are trustees for every party to carry out the trusts created by the will and Act of Parliament, and there was an implied agreement on behalf of the beneficiaries to keep the trustees safe. The ground of appeal to the House of Lords was that because they were trustees they were entitled to be indemnified.

As to the four claimants, take the case of the owner first. How is he, who is bound by the Act of Parliament, justified in saying that the rents and profits are to be paid to him contrary to the terms of the Act of Parliament? He, as owner, is placed at the bottom of the schedule, and yet he asks to be paid in front of everyone else. The payment which the trustee has suggested is in the teeth of the provisions of the compromise and the Act of Parliament, and the terms of Lord Macnaghten's judgment.

Mr. Law says that these rents collected in 1898 and 1899 by

the trustee are to be considered as if they were in the pocket of the owner, and that no one else has any claim to them; but that is inconsistent with Lord Macnaghten's decision. Although the compromise and the Act of Parliament provide for a specific payment, it is suggested that the money in the hands of the trustee is not to be used for this purpose. As to the case of *In re Bowes*; *Strathmore* v. *Vane* (1), there there were prior charges on the estate, but the consent of all persons who had prior charges had been obtained; their consent was necessary, and here we do not consent. It cannot be said that we have no remedy against the persons directed to carry out the provisions of the Act. Section 16 of the Act gives the trustees certain powers; and by the compromise (clause 13) they were put into possession of the entire estates. This appears clearly from the judgment of Lord Macnaghten in the House of Lords (unreported), when he says: —"From first to last the arrangement proceeds upon the footing that the will was to be established, that it was to be proved by the persons named in it as executors and trustees, that the executors and trustees were to collect the assets and manage the real estate (other than the mansion-house and demesne at Aughrane), and that all payments under the will and under the compromise were to pass through their hands." The charge of £25,000 was created by section 3 of the Act, and was thereby charged on the real estates which include Aughrane.

The second claimants for this fund are the legatees of £5000 each, Bernard William Bagot and Charles Augustus Bagot, the brothers of the testator. The former was bound by the Act; the latter predeceased the testator, and his sons George Thomas Bagot, Bernard William Neville Bagot, the younger, and William Bagot, are also bound by it. If Lord Macnaghten is right in saying that the trustees are to carry out the provisions of the Act, these two legatees take subject to the provisions of it. It cannot be said that they were entitled to be paid in preference to the parties without whom the compromise could not have been carried out. The only question decided by the Court of Appeal was as to the three annuities, the costs mortgages, and our

(1) [1896] 1 Ch. 507.

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£25,000. The House of Lords only reversed what the Court of Appeal decided, and not what it did not decide : see the judgment of Fitz Gibbon, L. J., at p. 527 (1), pointing out that before it can be decided that any of the legacies can be thrown upon the real estates, the disposal of the personal estate, and of the rents and profits, before the appointment of the receiver, must be ascertained.

The third claimant is Mrs. Wynne Roberts. It cannot be said that she is entitled to this fund, which is composed of rents collected in 1898 and 1899, and at that time her annuity was not in arrear.

The fourth claimants are the Representative Church Body. They are not bound by the Act, so they take priority over our £25,000. But they were to be paid only while the trust for the accumulating fund lasted, and as it has ceased they have now no claim.

H. D. Conner, K.C. (with him *Chaytor*), for Mrs. Meagher and the legatees of the two legacies of £5,000 bequeathed to Bernard William Bagot and Charles Augustus Bagot :—

These claimants are in front of all. When the rents accrued the annuity to Mrs. Wynne Roberts had been paid to date, and so she cannot claim them. There is no distinction between these two legacies and the other legacies. Admittedly all the annuities and legacies are charged on the fee : see the judgment of this Court, at page 506 of the report of *In re Bagot's Estate* (2). Further on, at page 508, it is pointed out that the debts and existing charges are bulked with the annuities, legacies, and testamentary expenses. Now these legacies are included with the others, and so are charged on the *corpus*. There is no indication that the legacies were to lapse if there was no accumulating fund.

Leech, for Arthur White :—

We represent the costs mortgagees, and have carriage. The general estate and Aughrane are held in trust to pay off those

(1) [1900] 1 I. R. at p. 527. (2) *Ibid.* 496.

mortgages or as a guarantee for them. The costs mortgagees stand in the shoes of the trustees and executors under the will, and they are entitled to that advantage. I submit that as the costs mortgages are part of the testamentary expenses under the clause in the will, that of itself puts them in priority to any other charge affecting the lands save the annuity for Mrs. Wynne Roberts provided by deed by the testator. It is true that interest has been paid on these mortgages, but we claim this money as part of our security, to be paid to us, or retained for us. Until the testamentary expenses are discharged nothing else can be done with the rents and profits save so far as they are applicable to Mrs. Wynne Roberts' annuity. In the latter part of the will the legacies are directed to be paid out of the accumulating fund, and the trustees are given a discretion as to the time for such payment. We say that the accumulating fund is subject to the payment of the testamentary expenses, and only commences after they are fully discharged. The maintenance clause is subject to the payment of the testamentary expenses. It is true that the costs mortgages do not contractually affect Aughrane; but as the money secured by the costs mortgages was testamentary expenses, and these are under section 15 of the Act to be paid and discharged out of the rents and profits of the entire real estate when the personal estate is insufficient, this money, being rents and profits of the real estate, is payable to us. If the rents of Aughrane were not to be included, it would have been specifically stated. The fact that the estate is for sale in this Court, and that the practice is only to pay the interest pending the sale, does not affect the matter, as the present question is brought before the Court as before a Judge of the Chancery Division; there was no receiver over the estate when the rents were collected; they accrued before the absolute order for sale was made.

Walker, for the Representative Church Body:—

We are not bound by the Act. Instead of receiving £100 per annum for twenty years, we have only received £80 per annum; and so there were arrears due to us amounting to £400. Our position was attacked on the previous hearing on the grounds

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(1) that we were statute-barred; and (2) that we were only on the estate for twenty years, and not on the fee; but this Court held that we were on the fee. The Court of Appeal affirmed that; and in the House of Lords Lord Macnaghten held the same. Again, when the matter came back to the Court to settle the priority order our position was attacked, but we were held chargeants on the land; and the Court of Appeal held that we were in equal priority with Mrs. Meagher. There is no one in front of our annuity except the costs mortgagees and Mrs. Wynne Roberts. Mrs. Meagher was not then in arrear; neither were they. Consequently the Representative Church Body is entitled to be paid £400 out of the fund in the hands of the trustee. The trustee here in applying to the Court is not exercising his discretion; he is abandoning it These rents were received by the trustee for us; the owner is *puisne* to us. We do not claim any part of the rents arising out of Aughrane. The costs mortgagees cannot require the mortgagor to put by the rents for them. The right of the legal mortgagee is to take possession; and so long as he abstains from doing so the mortgagor, remaining in possession, is not bound to account to the mortgagee for the rents: see Fisher on Mortgages (5th ed.), paragraph 1721. As to Mrs. Wynne Roberts, she cannot have any claim in priority except under the will; and she should being a personal action, as the personal covenant gives her no right in respect of the money here.

A. C. Meredith (with him *Matheson, K.C.*), for Mrs. Wynne Roberts:—

1. Mrs. Roberts' charge is, as to the lands other than Aughrane, an annual sum charged on the premises within the meaning of the words in the minority clause, and it differs from every other charge. Mr. Leech represents a capital mortgage at interest, and that is not an annual charge within the meaning of the will. The Representative Church Body's claim is only for a gross sum charged on the premises. Under the order of the Court of Appeal they have the fee and the rents to look to, but the sum here is not either the fee or the rents accumulated during the twenty years, for that term had expired before the rents now in question

accrued due. Apart from this, Mrs. Roberts is in front of the Church Body on the schedule. Mr. Conner's clients also have a gross sum, with interest, and not an annual sum. It must be remembered that there is an actual trust for Mrs. Roberts.

2. As to the land set out in the first part of the second schedule to the order of the 30th March, 1900, Mrs. Roberts is the owner of a rentcharge. This Court held that the covenant in her deed creates a liability, and that a liability existing at the time of the testator's death was payable out of his assets. The £770 arising from these rents are assets for this purpose. It is clear, if Mr. Jellett's argument is correct, that under the compromise and Act of Parliament the trustees are equally trustees for Mrs. Roberts.

[As to the liability of a pernor of the rents and profits in an action to recover a rentcharge there were cited *Swift* v. *Kelly* (1); *Odlum* v. *Thompson* (2); *Pertwee* v. *Townsend* (3); and *In re Herbage Rents, Greenwich; Charity Commissioners* v. *Green* (4)].

G. Fitz Gibbon, in reply :—

We alone, with Mr. Law's client, are entitled to the rents and profits out of Aughrane. It cannot be said that the costs mortgagees have all the rights of the executors; they are merely mortgagees. They have the priority of the executors, but not the rights as to Aughrane; they are paid their interest in full. The charge for £25,000, to which we are entitled, is charged on all the estates, including Aughrane. In at least seven instances in the will the reference to "the estates" clearly includes Aughrane, and where it is desired to exclude Aughrane, express words are employed. Consequently the interest on this charge for £25,000 comes within the minority clause in the will, being an annual sum. Mr. Conner's clients are not entitled to be paid until the building fund is provided for; and we contend that the two legacies, the legatees of which he represents, were never on the fee.

As to the Representative Church Body's claim, they were

(1) 24 L. R. Ir. 107, 478.
(2) 31 L. R. Ir. 394.
(3) [1896] 2 Q. B. 129.
(4) [1896] 2 Ch. 811.

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entitled to an annual stipend, and not a sum of £2000 payable by instalments. Their charge cannot be extended to the rents which accrued after the twenty years have expired. It is clear that Milo Victor Neville Bagot was never pernor of the rents and profits. According to the judgment of the Chief Baron in *Swift* v. *Kelly* (1), at page 486, the pernor of the profits should not only take, but be entitled to take the rents. Here Milo Victor Neville Bagot could not take the rents as there were incumbrancers in arrear: see *Sligo Railway* v. *Whyte* (2).

If the trustee in exercise of his discretion acts honestly, the exercise of it cannot be impeached: *In re Lofthouse* (3); but here the trustee has no discretion.

Longfield, in reply:—

The rents should be distributed in accordance with the equitable rights affecting them at the time they were collected.

April 16.

Ross, J.:—

This matter comes before me for the determination of certain questions on an originating summons. The plaintiff is the sole surviving trustee of the will of Christopher Neville Bagot. It is now admitted by everybody that the personal estate has disappeared. An absolute order has been made for the sale of the real estate in this Court. An order has been made directing the receiver as to the priority in which he is to apply the rents and profits. The receiver was appointed in the year 1899. Before his appointment the trustees went into possession of the real estate, and have collected thereout a sum of £1433 16*s.* 6*d.* The direction of the Court is now sought as to the disposal of this sum.

It is necessary to divide the testator's lands into three parts. (1) Lands other than Aughrane, on which the testator's wife, now Mrs. Roberts, had a specific charge of £1000 per annum under a deed made in 1876. (2) Lands other than Aughrane not the

(1) 24 L. R. Ir. 478. (2) 31 L. R. Ir. 316. (3) 29 Ch. D. 921.

subject of the said charge directly. (3) The mansion-house and demesne lands of Aughrane. It is also necessary to consider the priorities of some of the claimants as ascertained, and what lands their several charges affect.

First, we find the rentcharge in favour of Mrs. Wynne Roberts. Under the two deeds of 1876 primarily it only affected the lands therein mentioned. I have decided that the effect of the covenant is to create a debt within the meaning of the earlier part of the testator's will, and that this debt, with the other debts, is charged on the testator's real estate other than Aughrane. The effect of this is that while No. 1 is primarily charged, any deficiency falls on No. 2. Next we have the costs mortgages. These are charged on the estate by virtue of the Act of Parliament. Interest has been paid up to date. They also affect Nos. 1 and 2. Next in order come the annuitants Mrs. Meagher and the Representative Church Body. These charges only affect Nos. 1 and 2. Next we have William Hugh Neville Bagot's charge of £25,000 created under the Bagot Estate Act. This charge affects the whole of the testator's real estate, *i.e.* Nos. 1, 2, and 3. In the view that I take it is unnecessary to go further.

As to Aughrane, No. 3, successive life estates were under the limitations in the will conferred on John Lloyd Neville Bagot and Thomas Edward Neville Bagot. On the death of the latter his eldest son, Milo Victor Neville Bagot, succeeded as first tenant in tail. He was a minor at the time of his accession, and at the time when this money was collected. It is contended on behalf of this minor that on his succession the trustee must be taken to have entered into possession of the Aughrane estate under the terms of the minority clause in the will. His contention is that the trustees were in the position of a mortgagor in possession before the appointment of a receiver. Such a mortgagor receives the rents and profits for his own use, and not as agent for the mortgagee.

It is contended that in ascertaining the rights of the parties I am only to look to the condition of affairs then, and decide what the trustees should have done with the money at that time. On the other hand, it is pointed out that the trustees have other duties by virtue of other provisions in the will, the compromise, and the

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Bagot Estate Act. It is therefore contended that to pay moneys to the minor before the claims of persons higher in priority are satisfied is a breach of trust. In the view I take of the matter it does not become necessary for me to determine what parties are merely chargeants, and to what parties the plaintiffs stand in a fiduciary position. It may be that if the trustees had paid some of the money to the minor, or to some of those who have appeared to claim it in this matter, it would have been impossible to follow it. It is, however, one thing to follow money that has once been paid, it is another to ascertain the right of the parties to a fund in the control of the Court.

In my opinion it would be erroneous for a Court of Equity to decide the matter, having regard to the state of affairs existing at the time the money was collected, wholly regardless of rights that have since been ascertained and of circumstances that have since occurred (1). The duty of the Court is to declare in what way the money is now to be applied, and I accordingly proceed to do so. Of the sum of £1433 16*s.* 6*d.* the sum of £663 13*s.* 7*d.* is the produce of Aughrane, and £770 2*s.* 11*d.* is the produce of Nos. 1 and 2, the rent of the estate.

Mrs. Roberts is first in priority on the lands other than Aughrane. Considerable arrears are due to her now. It is true the rentcharge was paid up at the time the money was collected. Is that any reason why a Court of Equity should allow moneys under its control issuing out of the lands subject to the charge to escape? In my opinion that would be a misapplication of these moneys, and would be wholly inequitable and unjust. Therefore the entire £770 2*s.* 11*d.*, subject as hereinafter mentioned, must be applied in satisfaction of the rentcharge of £1000. As to the £663 13*s.* 7*d.*, I have already decided that William Hugh Neville Bagot's charge of £25,000 extends to Aughrane. This sum is therefore payable to him subject to what I am about to mention. I declare the plaintiff entitled to have his taxed costs payable out of the two sums proportionately. Mrs. Wynne Roberts and William Hugh Neville Bagot I declare entitled to their costs out

(1) See *Beatty* v. *Cordner*, [1903] 1 I. R. 15; *Leahy* v. *DeMoleyns*, [1896] 1 Ir. R. 206.

of the respective sums to which they are entitled. All the other parties must abide their own costs.

Solicitor for the plaintiff: *E. White.*
Solicitor for the owner: *G. M. Meares.*
Solicitors for Arthur White having carriage in the Land Judge's matter: *Fry & Son.*
Solicitors for William Hugh Neville Bagot: *Moore, Keily, & Lloyd.*
Solicitors for Mrs. Meagher and others: *Montgomery & Chaytor.*
Solicitors for the Representative Church Body: *Maunsell, Darley, & Orpen.*
Solicitors for Mrs. Roberts: *Collis & Ward.*

W. C. S.

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May 15.

IN THE MATTER OF THE ESTATE OF DENIS BINGHAM AND DENIS GEORGE BROAD BINGHAM, A MINOR, BY JOHN GRIFFIN, HIS GUARDIAN AD LITEM, OWNERS; EX PARTE GERALD HENRY BINGHAM, PETITIONER.

Land Judge's Court—Jurisdiction—Partition of a yearly tenancy.

The power which the Land Judge has to partition includes a power to partition a yearly tenancy.

MOTION by the petitioner that a rent of £59 18*s.* 6*d.*, payable out of the lands of Tarsehane, in the barony of Erris, and county Mayo, by Patrick Conway and Marcus Kean, as tenants from year to year, should be apportioned and payable as from the 1st May, 1899, as to £48 portion thereof to Denis Bingham and the persons representing him, and the persons entitled on his death, the rent to be payable out of part of the lands containing 4400 acres statute measure, and the sum of £11 18*s.* 6*d.*, the residue of the rent of £59 18*s.* 6*d.*, to be payable to Henry Herbert Shaen Bingham out of the other part of the lands containing 1039 acres; that Patrick Conway and Marcus Keane be ordered to pay the

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same accordingly; and that all parties have the same rights in respect of the apportioned rents as they formerly had in respect of the rent of £59 18*s.* 6*d.*

The petition for sale and partition was filed in 1887 praying for a partition of, among other lands, the lands of Tarsehane, Munigarrell, Altnabrocky, and Leam, in the barony of Erris, and county Mayo. The life estate in all the other lands included in the petition was partitioned between the owner Denis Bingham and Henry Bingham, deceased, and by absolute order for partition, dated the 19th of March, 1889, it was ordered that the partition of the life estate should be adopted as a basis for the division of the fee. An order for the survey and valuation of the lands was made, and the surveyor duly made his report, whereby he proposed to allot the townland of Leam and 4400 acres of the townland of Tarsehane in one division, and the residue of the townland of Tarsehane, containing 1039 acres, and the lands of Munigarrell and Altnabrocky in the other division. The lands of Tarsehane were held by two tenants, Patrick Conway and Marcus Keane, under what was then supposed to be a grazing letting, but which subsequently turned out to be a tenancy from year to year at the rent of £59 18*s.* 6*d.* Before this was ascertained the final order for partition was made on the 24th of November, 1899. The tenants refused to pay any rent to the receiver. Under these circumstances, a consent was entered into between the solicitor having carriage and the owner of the residue of the townland with a view to the apportionment of the rent, and it was agreed that it should be apportioned in the manner referred to above. The proposed apportionment was approved of by the receiver; the tenants, however, refused to sign it.

Leech, for the party having carriage:—

The power to apportion the rent reserved by a lease under section 72 of the Landed Estates Court Act includes the power to apportion the rent in respect of a yearly tenancy. Under section 79 the Court has full power to partition land, and it follows that it has power to apportion the rent issuing out of the land, otherwise a sale would under the circumstances be impossible.

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The Court has, by statute, power to partition lands. It is not deprived of this power by reason of the fact that there is a tenant whose holding extends beyond the estate. I am of opinion that in the power to partition is included the power to partition a tenancy from year to year, and I order accordingly.

Solicitors having carriage: *Hardman & Son.*

W. C. S.

THE ATTORNEY-GENERAL FOR IRELAND *v.* THE LONDONDERRY BRIDGE COMMISSIONERS AND JAMES STEWART.

M. R.
1902.
June 14.
July 2, 23.

(1901. No. 979.)

Crown—Post Office—Ferry—Londonderry Bridge Act, 1877 (40 & 41 *Vict. c. cxcvi.*).

Although Post Office officials, as servants of the Crown, are entitled to be carried free over ferries properly so called, such right does not apply to a ferry which a Corporation is empowered by statute to establish and work, but is under no obligation to maintain.

TRIAL OF ACTION.

This was an information brought by the Attorney-General for Ireland, on behalf of His Majesty the King, claiming a declaration that the Postmaster-General, his officers and servants, while under his authority, managing, sending, or carrying mails, telegrams, or other post letters within the meaning of the Post Office Acts, or going for or returning from conveying, forwarding, or carrying the same, were entitled to use and pass over the steam ferries of the defendants free of tolls, and an account of all tolls paid by or on account of the Postmaster-General since July 16, 1901. The matters relied on by the Attorney-General were set forth in the information and statement of claim as follows:—

1. By the Londonderry Bridge Act, 1852 (15 Vict. c. cvi.), the Londonderry Bridge Commissioners (thereinafter called the defendants) were constituted a Corporation with perpetual succession,

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and were authorized to build a new bridge over the River Foyle at Londonderry, in lieu of the then existing bridge, according to the plans in the said Act mentioned, and to levy certain tolls as therein provided, and the property of the trustees for executing the former Acts thereby repealed relating to the bridge over the River Foyle, including certain rights of ferry over the River Foyle, were vested in the said Bridge Commissioners.

2. By the 55th section of the said Act it was provided that no pontage toll or duty should be demanded in respect of the use of the said bridge, or of any ferry which might be used in lieu of such bridge or any bridge thereafter to be built for any person employed in conveying mails or expresses under the authority of the Postmaster-General either when employed in carrying, conveying, fetching, or guarding such mails or expresses, or returning back from conveying, carrying, or guarding the same.

3. By the 76th section of the said Act it was provided that nothing therein contained should divest, prejudice, diminish, alter, or take away any of the estates, rights, privileges, powers, or authorities vested in or enjoyed by Her late Majesty, her heirs or successors.

4. By the Londonderry Bridge Act, 1854 (17 & 18 Vict. c. xcviii.), the defendants were empowered to construct the said new bridge upon another site and in accordance with other plans than those authorized by the Londonderry Bridge Act, 1852, and to levy (subject to the same exemption as in the said Act of 1852 provided) the same tolls as therein mentioned. The 29th section of the said Act of 1854 contained a similar clause, saving the rights of the Crown to the 76th section of the said Act of 1852.

5. By the Londonderry Bridge Act, 1859 (22 Vict. c. vii.), the defendants were empowered to abandon the construction of the bridge authorized by the Londonderry Bridge Act, 1854, and in lieu thereof to construct the bridge approaches and other works authorized by the Act now in recital and the Londonderry Bridge Act, 1852, and the Londonderry Bridge Act, 1854, were thereby repealed, and the defendants, notwithstanding such repeal, were reconstituted as Bridge Commissioners, and their property (including the said rights of ferry) re-vested in them, and by section 61 of the said Act the tolls therein specified (including a

toll of one halfpenny for every foot passenger passing along the bridge) were authorized to be demanded and taken by such persons as the defendants should from time to time appoint, and the said tolls were vested in the defendants.

6. By section 64 of the said statute it was enacted that "No toll shall be demanded or taken by virtue of this Act in respect of the use of or passage over the said bridge, or any bridge which shall be hereafter built in lieu thereof, or any ferry which may be used in lieu of such bridge, or of any bridge to be hereafter built, for any horses or carriages attending Her Majesty or any of the Royal Family, or returning therefrom; or for any mail carriage provided by Her Majesty's Postmaster-General, or by any person contracting with the said Postmaster-General to provide the same, or for any horse or beast drawing the same, or for any horse or beast not drawing and employed in carrying, or any person employed in conveying mails or expresses under the authority of Her Majesty's Postmaster-General, either when employed in carrying, conveying, fetching, or guarding such mails or expresses, or returning back from carrying, conveying, or guarding the same," and by section 84 all rights, privileges, powers, and authorities were saved and preserved.

7. By the Londonderry Bridge Act, 1877 (40 & 41 Vict. c. cxcvi.), the defendants were authorized to borrow money for the purpose of freeing the upper roadway of the bridge from toll in perpetuity. And by section 24 it was provided that "It shall be lawful for the Bridge Commissioners, and they are hereby empowered and authorized to acquire, maintain, let on lease, or otherwise to work steam or other ferries on the River Foyle, at any place or places within the municipal limits of the city of Londonderry, which to the said Commissioners may seem good, and at any place or places outside such municipal limits to which the Irish Society shall, by writing under their seal, consent, and to demand and take tolls, rates, and charges for or in respect of the use thereof, not exceeding one penny for every passenger, and for all animals, carriages, goods, and articles not exceeding the several tolls authorized to be demanded and taken in respect of the bridge under the powers of the Act of 1859."

8. Under the authority conferred by the Londonderry Bridge

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Act, 1877, and shortly after the date of its passing, the defendants established a service of steam ferries across the River Foyle, and still continued to maintain and work the said ferries.

9. The said steam ferries plied between the Prince's Quay and Abercorn Quay on the city side of the River Foyle and the Waterside (which was a large and important suburb of the said city, and contained the terminus of the Belfast and Northern Counties Railway) on the opposite side of the said river, and the said ferries formed the nearest and most convenient means of communication between that part of the said city where the principal post-office and telegraph office were situate and the Waterside; and for many years the officers and servants of Her late Majesty's Postmaster-General used and passed over the said ferries while carrying mails, telegrams, and other "post letters" within the meaning of the Post Office Acts or going for or returning from carrying the same, under the authority of the said Postmaster-General, without paying any toll.

10. In the year 1900 the defendants for the first time demanded toll from the officers and servants of the Postmaster-General for using and passing over the said ferries while such officers and servants were carrying mails, telegrams, and post letters, or going for or returning from carrying the same under the authority of the Postmaster-General, and such tolls were paid to the defendants by and on behalf of the Postmaster-General under protest, but notwithstanding such protest the defendants persisted in demanding toll from the officers and servants of the Postmaster-General for using and passing over the said ferries while employed as aforesaid, and such tolls were from time to time since the 16th day of July, 1900, paid under protest to the defendants by and on behalf of the Postmaster-General. An account of the sums so paid was kept by the Post Office since such tolls were first demanded, and the total amount thereof from the 16th July, 1900, to the 31st December, 1901, was £90 2*s.* 6*d.*

11. The Attorney-General charged that by virtue of the prerogative of the Crown and the Post Office Acts the Postmaster-General, his officers and servants, employed in conveying, guarding, or carrying mails, expresses, telegrams, and other post letters, or returning from conveying, guarding, or carrying the

same were exempt from toll when passing over or using the said ferries.

12. The Attorney-General further charged that under the provisions of the Londonderry Bridge Act, 1859, and the Londonderry Bridge Act, 1877, and the other Acts referred to or incorporated therewith or relating to the said bridge and ferry, the Postmaster-General, his officers and servants, employed as aforesaid were exempt from toll when passing over and using the said ferries.

13. The defendant James Stewart was named as a nominal defendant in his capacity as clerk or secretary of the said Commissioners, and no relief was sought against him personally.

The prayer of the information was as already stated.

The material averments in the statement of defence of the Commissioners were as follows:—

2. With reference to the rights of ferry mentioned in the first and fifth paragraphs of the information, the defendants said that long prior to the date of the statutes mention in the information, and prior to the year 1662, an ancient ferry existed across the River Foyle at the city of Londonderry, and that by charter bearing date the 10th day of April, 1662, His Majesty King Charles the Second granted to the Society of the Governor and Assistants, London, of the New Plantation in Ulster, commonly known as and thereinafter referred to as the Irish Society (which were thereby incorporated), the said ancient ferry, and the same continued in the possession of and was worked by the said Irish Society and their lessees down to the date of the erection of the bridge next hereinafter mentioned. In or about the year 1789 the Irish Society agreed with the Corporation of Londonderry to convert a certain lease, dated the 15th of January, 1679, of the said ferry, that had been made and several times renewed to the said Corporation, into a perpetuity, reserving to the said Society a rent of £20, then Irish currency, equivalent to £18 9*s.* 2*d.*, for the purpose of enabling the said Corporation to erect a bridge across the River Foyle on the site of the said ancient ferry, and that in or about the year 1790 the said bridge was erected on the said site under the provisions of

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30 Geo. 3, c. 31 (Ir.). After the erection of the said bridge the said ferry was entirely discontinued, and ceased to exist, and became merged in the said bridge, save for a short period in or about the year 1813, when the said bridge was destroyed, and until a new bridge was erected in lieu thereof, in or about the year 1815, under the provisions of 54 Geo. 3, c. ccxxx. The last-mentioned bridge continued to exist till the present bridge across the River Foyle was erected in the year 1863 in lieu thereof, under the provisions of the Londonderry Bridge Act, 1859. The said ferry, so vested as aforesaid in the Corporation of Londonderry, was prior to the erection of the present bridge transferred to the defendants, the Londonderry Bridge Commissioners, for the purpose of enabling them to erect the said present bridge. The said ancient ferry was the only right of ferry vested in the defendants, the Londonderry Bridge Commissioners, by any legal transfer or any Act of Parliament, or in any way whatsoever; and the rights of ferry mentioned in the Londonderry Bridge Act, 1852, and the Londonderry Bridge Act, 1859, referred only to the said ancient ferry, and the defendants submitted that the said ancient ferry was and had been, since the present bridge was erected, merged in the present bridge.

3. The defendants said that they made no charge against His Majesty's Postmaster-General, his officers or servants, for tolls for crossing the said bridge, or in respect of the said ancient ferry so merged therein.

4. In respect of paragraph 6 of the information, the defendants said that they had not established, nor did they maintain any ferry in lieu of the said ancient ferry, or in lieu of the present or any former bridge across the River Foyle at Londonderry.

5. With reference to the eighth and ninth paragraphs of the information, the said defendants said that for many years prior to the establishment of the row-boat service next hereinafter mentioned, it was the custom of watermen in the city of Londonderry to carry passengers for hire across the River Foyle from any convenient landing places on one side of the said river to convenient landing places on the other side of the said river, within the limits of the said city, which custom was recognised and regulated by

the provisions of the Londonderry Port and Harbour Act, 1854, 17 & 18 Vict. c. clxxvii. Soon after the present bridge was erected the defendants, conceiving that they were legally entitled to do so, established a service of row-boats across the said river at convenient places within the said city, and prior to the passing of the Londonderry Bridge Act, 1877, the defendants purchased a small steamboat for the purpose of carrying on the said service, but the defendants said that neither the said service of row-boats nor the service carried on by the said steamer was an exercise of any ferry rights vested in the defendants, or was a ferry in the legal acceptation of the term, and was carried on merely to supplement the income derived by the defendants from the tolls of the said bridge so as to enable the defendants to keep the said bridge in repair, and to aid in discharging the debt incurred in the erection of the said bridge, and for the convenience of the citizens of Londonderry.

6. The defendants further said that prior to the passing of the Londonderry Bridge Act, 1877, doubts had arisen as to the rights of the defendants, who were incorporated for the purpose of erecting and maintaining the present bridge, to apply any part of the funds in the purchase of row-boats or of steamboats for the purpose of the said service, and it was only to remove such doubts, and to enable the defendants so to apply their funds, that the 24th section of the said Londonderry Bridge Act was passed, and the defendants denied that they had established or worked or maintained any service of ferries under the authority of the said Act, and submitted that the said Act had not conferred any right of ferry on the defendants. The defendants had not acquired any ferry save the said ancient ferry now merged in the present bridge, and save as aforesaid there was no ferry existing in the city of Londonderry.

7. With reference to the said paragraphs 8 and 9, the defendants further said that the service of steamboats carried on by them did not form the continuation of any highway across the said river, but was maintained merely for the purpose of carrying passengers conveniently to and from one place on the quays of the said city, from and to several convenient places on the said quays on the other side of the said river, which said

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places were the property of the Londonderry Port and Harbour Commissioners, and were assigned, regulated, and controlled by them. The defendants said that the continuation of the highway across the said river was the said bridge.

8. The defendants submitted that the service of steamboats carried on by them did not constitute a ferry within the meaning of any of the Post Office Acts, or within the meaning of the 55th section of the Londonderry Bridge Act, 1852, or of the 64th section of the Londonderry Bridge Act, 1859, and that the Royal prerogative did not exempt the Postmaster-General, his servants or officers, from liability to pay fares as a return for being carried as passengers in the said steamboats of the defendants.

The Attorney-General joined issue on the statement of defence, and charged that the matters alleged in paragraphs 6, 7, and 8 of the defence did not constitute any answer in law to the claim. As to paragraph 7 of the defence, the informant further said that, admitting for the purpose of reply that the places mentioned in the said paragraph were the property of the Londonderry Port and Harbour Commissioners, the defendants had the right of embarking and disembarking passengers at the said places, and that the public had access to the same as of right for the purpose of using the steam ferries carried on by the defendants, and that the same were highways and dedicated to the public as places for landing from and embarking on the steam ferries and other ferries of the defendants.

The informant further charged that the defendants had not any right or title to demand any sum or sums of money from the Postmaster-General, his officers or servants, when engaged upon the Post Office services in the information and statement of claim mentioned by way of tolls, or fares, or otherwise for passing or repassing in the steamboats or ferries of the defendants, whether the same constituted an ancient ferry, or were worked and maintained under the powers of the Londonderry Bridge Act, 1877, or otherwise.

A map was proved, which showed the position of the ferries and landing places mentioned in the statement of claim. It was

proved that tickets for the ferries could be bought by anyone, and that the amount paid by the Post Office for ferrying their servants was about £60 a-year. There had been three steam ferries established by the defendants, but one was discontinued, and the service carried on by row-boats; this service was not of much profit owing to the rival boat service established by Francis M'Keever, which the defendants had unsuccessfully endeavoured to stop: *Londonderry Bridge Commissioners* v. *M'Keever* (1). The defendants' ferries were not continuations of highways, inasmuch as to reach the ferries intending passengers had to cross the property of the Londonderry Port and Harbour Commissioners, and in the case of one ferry the property of the Belfast and Northern Counties Railway Company.

The Attorney-General (*Right Hon. John Atkinson, K.C.*), *The Solicitor-General* (*Campbell, K.C.*), *Samuels, K.C.*, and *F. N. Greer*, for the informant:—

The Crown claim the right to free use of these ferries for Post Office officials. *The Londonderry Bridge Commissioners* v. *M'Keever* (1) decided that no obligation to maintain these ferries was imposed by statute on the present defendants, and that therefore they could not, like the owner of an ancient ferry liable to such obligation, obtain an injunction to restrain M'Keever, who had without title established a ferry, from interfering with the profits of one of the ferries of the present defendants. The difference between an ancient ferry and a ferry authorized by Act of Parliament, which does not confer a monopoly, is shown by the case of the watermen: *Letton* v. *Godden* (2). If the Londonderry Bridge Act, 1877, had conferred on the defendants a legal right of ferry, they would have been bound to carry Post Office officials free. The first bridge over the Foyle at Londonderry was built pursuant to 30 Geo. 3 (Ir.), c. 31, which empowered the Corporation of Londonderry to build a bridge and levy certain tolls for its support. There is no reference in that Act to any right of the Crown to be free from tolls, but the Act did not bind the Crown, not being named in it: *Mersey Docks* v. *Cameron* (3).

(1) 27 L. R. Ir. 86, 464. (2) L. R. 2 Eq. 123. (3) 11 H. L. Cas. 443.

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Immunity from toll is part of the prerogative of the Crown, and this privilege cannot be affected except by express enactment: *Mayor of Weymouth* v. *Nugent* (1). It is recognised in various statutes relating to the Post Office and the carriage of mails, *e.g.* 23 & 24 Geo. 3 (Ir.), c. 17, s. 33, provided that post boys, riders, and carriages engaged in conveying His Majesty's mails should pass free of toll, rate, or duty on all post roads, over all bridges, and across all ferries; and section 34 imposed a penalty of £1 on anyone demanding toll, rate, or duty contrary to such provision. This Act was in force until 1837, when it was repealed by 7 Wm. 4 and 1 Vict. c. 32, and 7 Wm. 4 and 1 Vict. c. 36, s. 9, was passed, which imposed a penalty of £5 on collectors of turnpike tolls and ferrymen for the like offence, and this was extended to telegraph messengers by subsequent statute.

The Londonderry Bridge Acts of 1852, 1854, and 1859, referred to in the statement of claim, save the rights of the Crown, and prohibit the taking of any toll from persons using the bridge by the order of the Postmaster-General. These provisions may have been inserted *ex majori cautela*: *Mayor of Weymouth* v. *Nugent* (1). The Londonderry Bridge Act of 1877 does not contain any such prohibitory words as regards the ferries authorized by it, but as the ferries were to benefit the public in addition to the bridge, and the tolls to be derived from them were to be applied in defraying the expenses of the bridge, it would be strange that while tolls could not be exacted from the servants of the Crown for the use of the bridge, the principal source of revenue, tolls could be exacted from them for the use of the ferries, the ancillary source of revenue. Section 28 provides that, in case the funds derived from the use of the lower roadway and ferries shall not be sufficient to keep the bridge in repair, the grand juries of the city and county of Londonderry and the county of Tyrone are from time to time to present for the deficiency to an amount not exceeding £1000. Could the defendants increase the burthen on the counties by discontinuing the ferries? Even if it is optional to discontinue the ferries, so long as they are worked, the servants of the Crown cannot be charged toll.

(1) 6 B. & S. 22.

It was held by the Exchequer Chamber in 1868 that the tolls and toll-houses established under the Bridge Act of 1859 were "dedicated to public purposes," and that therefore the Bridge Commissioners were not liable to be rated to the relief of the poor in respect of these: *Guardians of Londonderry Union* v. *Londonderry Bridge Commissioners* (1). The Act of 1877 was for public purposes, the right to levy tolls was given, and the destination of the tolls was fixed by Parliament. When Parliament gives power to carry on a ferry for public purposes, the right of taking toll is burthened with the obligation to carry the servants of the Crown toll free. With reference to the row-boat service mentioned in paragraph 5 of the statement of defence, the power conferred by the Londonderry Port and Harbour Act, 1854 (17 & 18 Vict. c. clxxvii.), s. 26, of making byelaws respecting the charges of boats or ferry boats plying in the River Foyle, is subject to the provision in section 28 of the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), incorporated therewith, that "nothing in the special Act shall extend to charge with rates or duties any vessel in the service of Her Majesty, or any packet boat, or Post Office packet, or any Post Office bag of letters conveyed by any such packet boat, or packet, or by any other vessel whatsoever."

The defendants are not in the same position as a private person like M'Keever; they cannot confine their service to any particular class of persons; it is the public who are to be served. The fact that the ferries do not connect highways is immaterial, as it is not alleged that the defendants possess a legal ferry. In *Reg.* v. *French* (2) it was held that roads made by trustees, and for the use of which they could levy tolls under the authority of a local Act, were within the Turnpike Acts, though there was no obligation on the trustees to make the roads. Besides, the approaches to the river have been made by the defendants by agreements with the railway companies, from which they cannot withdraw.

Cooke, K.C., *Henry, K.C.*, and *Osborne*, for the defendants:—

The landing places on the Waterside are private property and

(1) 1. R. 2 C. L. 577. (2) 3 Q. B. D. 187; 4 Q. B. D. 507.

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held under terminable agreements; there is no public highway to and from the landing places. The "ferry" referred to in the Post Office Acts is a legal ferry.

Section 24 of the Act of 1877 is an enabling section, as was decided in *The Londonderry Bridge Commissioners* v. *M'Keever* (1), and there is no obligation on the defendants to keep up the ferries. "Tolls" referred to in that Act are analogous to railway tolls mentioned in the Railway Clauses Act, 1845, section 86, which are payments for services rendered, the right to payment not being given, but being moderated and limited by Parliament: *Pryce* v. *Monmouthshire Canal and Railway Company* (2), *per* Lord Cairns. *North and South Shields Ferry Company* v. *Barker* (3) shows that a legal ferry can be established by Act of Parliament, but different words were there used. The defendants are entitled, like other members of the public, to have boats on the river to take persons across: see *Londonderry Harbour Commissioners* v. *Londonderry Bridge Commissioners* (4), *per* Palles, C.B.

The prerogative right of the Crown to pass free over highways is more limited than has been stated: *Westover* v. *Perkins* (5), where the Queen's carriage when used by her permission was held exempt from toll. *Mayor of Weymouth* v. *Nugent* (6) is not in point.

Samuels, K.C., in reply:—

Tolls exist only by immemorial usage, express grant from the Crown, or by Act of Parliament: Coulson and Forbes on Waters, p. 551. The reference to railway tolls is not in point; 1 & 2 Vict. c. 98 regulates the relations of railways with the Postmaster-General. It is obligatory on railways to carry Post Office officials. The remuneration is settled by arbitration in default of agreement. The Act of 1859 and the Act of 1877 should be read together. The Act of 1877 refers to the Act of 1859 as to the power to charge tolls for the ferry, and it gives no greater power of charging toll than the Act of 1859. The excep-

(1) 27 L. R. Ir. 464.
(2) 4 A. C. 203.
(3) 2 Exch. 136.
(4) [1894] 2 I. R. 390.
(5) 2 E. & E. 57.
(6) 6 B. & S. 22.

tion in favour of the Post Office in s. 64 of that Act should be read into the Act of 1877.

The defendants are not in the same position as before the Act of 1877. Before that Act they had no power to charge toll for ferrying; it would have been *ultra vires*, as they were a Corporation. They are not in the same position as M'Keever; he has no power to charge tolls. General public advantage was contemplated by establishing steam ferries. Though this is not an ancient ferry, it is a ferry within the meaning of the Post Office Acts referred to. The defendants are authorized to take toll, which means, according to Gunning on Tolls, p. 2, a sum demanded for a passage through a highway or along a public ferry. It is a ferry in the ordinary sense of the word, as passengers can land at either side. There are two landing stages within a vill: *Newton* v. *Cubitt* (1).

July 23.

THE MASTER OF THE ROLLS:—

This action is brought by the Attorney-General, who claims a declaration that the Postmaster-General, his officers and servants, while under his authority conveying, guarding, or carrying mails, telegrams, or other post letters within the meaning of the Post Office Acts, or going for or returning from conveying, guarding, or carrying the same, are entitled to use and pass over the steam ferries of the defendants free of tolls; and (2) that an account may be taken of all tolls paid by or on behalf of the Postmaster-General since July 16th, 1900.

The history of the ancient ferry of Londonderry and of the bridge substituted for it has been so fully considered in this Court and the Court of Appeal, and incidentally in the Queen's Bench and the Exchequer Chamber, that I shall not waste time by a narrative which could only be a repetition; and the steam ferries with which this case is conversant were the subject of close consideration in *The Londonderry Bridge Commissioners* v. *M'Keever* (2). I assume an acquaintance with these cases.

(1) 12 C. B. (N. S.) 32. (2) 27 L. R. Ir. 86, 464.

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The case as presented by the Attorney-General was that although the steam ferries in question are not ancient legal ferries, that is ferries by Crown grant or prescription, and that no proceeding by mandamus, indictment, or otherwise could be successfully taken so as to compel the Commissioners to keep them open for traffic, yet, so long as they are in fact open, persons in the employment and service of the Crown, as Post Office messengers and the like, must be carried over the ferries toll free while engaged in or going to the discharge of their public duty or returning therefrom. Towards the end of his argument the Attorney-General intimated that he did not conclusively admit that the ferries could be discontinued at the pleasure of the Commissioners, but that he merely assumed it as against the Crown for the sake of the argument. I do not think the admission, even if conclusively made, was much of a concession, for I find it impossible to hold that the 24th section of the Act of 1877 is more than an enabling section, as indeed it was decided by the Court of Appeal to be. There are no words in it to indicate that that which is "made lawful" "empowered" or "authorized" is to be really obligatory; and as to policy, it would be contrary to the plain intention of the Act that the ferries authorized must be worked for all time even at a loss, which loss would fall upon the counties. Doubtless the privilege of using these steam ferries was intended if practicable to conduce to the pecuniary benefit of the trust, not to impoverish it.

It has been conclusively decided that the steam ferries under the Act of 1877 are not on the same footing as ancient ferries, and that they do not derive their existence from any exercise of the Royal prerogative. The Act of 1877 only prevents them from being, what they otherwise would be, *ultra vires* of the Commissioners.

"Perhaps the best legal definition of a ferry," says Fitz-Gibbon, L.J.: *Londonderry Bridge Commissioners* v. *M'Keever* (1), "is the right of providing a highway over water in consideration of tolls in the nature of turnpike tolls." Of course this is not intended as an exhaustive definition, but it explains what are

(1) 27 L. R. Ir. 482, 483.

the tolls referred to in this connexion, and they must mean tolls thorough.

A ferry is an exclusive right to convey passengers across a river or arm of the sea from one vill to another, or to connect a continuous line of road leading from one township or vill to another: *Newton* v. *Cubitt* (1). A right of ferry, being in derogation of the common rights of the public, rests upon the corresponding obligation on the part of the grantee of the right to maintain the ferry at all times for the use of the public, this obligation being enforceable by indictment and fine.

An Act of Parliament empowering a company to ply on Sundays from certain points on the bank of the Thames, but imposing no obligation to provide means of transport or to maintain their plying places, does not confer an exclusive right against the rest of the world: *Letton* v. *Godden* (2).

Blackstone says:—"If a ferry is erected on a river so near another ancient ferry as to draw away its custom it is a nuisance to the owner of the old one. For where there is a ferry by prescription the owner is bound to keep it always in repair and readiness for the use of all the King's subjects, otherwise he may be grievously amerced. It would therefore be extremely hard if a new ferry were suffered to share his profits which does not also share his burthen. But where the reason ceases the law also ceases with it."

These citations show how utterly impossible it is to hold that steam ferry boats plying between no fixed points, endowed with no exclusive privileges, onerated with no defined duties, which might be used or might not, and which, if used, might be discontinued at will, are *ejusdem generis* with the ferries of which one was replaced by the Londonderry Bridge.

How then is the claim of the Crown to have its servants ferried free formulated?

The Attorney-General puts it thus:—The ferries in question are adjuncts or ancillary to the bridge which replaces the ancient ferry, and as the Crown has the right claimed in respect of both

(1) 12 C. B. (N. S.) 32. (2) L. R. 2 Eq. 123.

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ferry and bridge (1 Vict. c. 36, s. 9), the right must extend over the new ferries as well.

The provisions of the Post Office Acts conferring upon the Post Office servants or at least recognising in them the right of using "ferries" toll free, were relied on by the defendants: but although it was on all hands admitted that the ferries mentioned in these Acts must be understood as legal ferries such as are defined in *Newton* v. *Cubitt* (1), yet the inference sought to be deduced from the express exemption in their case as going to negative any similar exemption in other cases may be placed aside, because the Solicitor-General said that the plaintiff's case did not in any degree rest on statutory enactment outside the Act of 1877, and that the sections of the Post Office Acts were merely passed *ex abundanti cautela*, and that the case depends upon principles of the common law apart from statutes altogether.

If this be so, I fail to see how the case for the Crown can be sustained.

We find a Corporation possessed of an ancient ferry in the strictest sense, empowered by statute to construct a bridge in lieu of the ferry, but with rights as nearly analogous to those of the ferry as may be. We find that the Corporation is authorized to use steam ferry boats at a different place or different places, such new ferries or ferry boats not being ancient ferries at all, but merely boats plying for hire, and to make a profit if possible in the same way as boats owned by any member of the public might do: but inasmuch as the Bridge Commissioners could not do that without misapplying their funds and so acting *ultra vires*, they were by the Act of 1877 enabled to apply their funds in that way; enabled but not compelled. No mandamus would lie to force them to run one boat. If they were compelled to run a boat where would it start from and where land? If they did run boats they were not obliged to renew or repair them. They possessed no right to prevent other persons from plying in competition with them, and, strangest of all, the Crown itself has for years been the chief support of their chief competitor, M'Keever.

(1) 12 C. B. (N. S.) 32.

His boats ply from a point just outside the Ebrington Barracks. No one can reach or leave his ferry without passing through those barracks. Yet the Crown has consistently allowed the public to use the Ebrington Barracks as the means of access to the ferry of M'Keever, and now seek to assert a right for its servants to use the boats of the defendants gratuitously, while doing all in its power to injure and destroy their trade by fostering an opposition, which if the defendants' ferries were regulated by the principles of the common law would be wholly illegal. But it is on the application of those principles that the right claimed by the Attorney-General must depend, since apart from them a telegraph boy has no right to a free seat in a ferry boat.

The high prerogative view of the Solicitor-General, and indeed of the Attorney-General also, was rested mainly on the judgment in the *Mayor of Weymouth* v. *Nugent* (1).

That was a case, not of a ferry, but in which the Corporation of Weymouth claimed a sum of 2*s.* 6*d.*, wharfage duties on 10 tons of block stone brought into the harbour from Portland by a barge for the use of Her Majesty's Government works. The claim was made under a local Act (2), which recited that by previous statutes customs on all goods imported into the harbour were payable to the Corporation; that they were empowered to erect a new bridge and maintain the harbour and its quays; and that they had borrowed money on the credit of the tolls or duties granted by a former statute which still remained due and could not be repaid, nor could the new bridge, harbour, and quays be maintained unless the tolls, &c., were increased. Section 2 of the local Act enacted that all petty customs and wharfage duties for all goods and harbour dues and ballast duties should be taken upon every ship, and should be vested in the Corporation. Section 29 enacted that coals imported "for the use of His Majesty's steam packets and actually used on board the same" were exempted from duty. By sect. 23 "any horses or carriages attending His Majesty or any of the Royal Family" were exempted from tolls for passing over the bridge. The respondent was commanding

(1) 6 B. & S. 22.
(2) 6 Geo. 4, c. cxvi.

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officer of the Royal Engineers, and refused to pay the 2*s.* 6*d.* when demanded of him by the collector of the appellants the Corporation. The magistrates dismissed the information and stated a case for the Court of Queen's Bench. That Court held that the stone brought by the barge into the harbour of Weymouth for the use of Her Majesty's Government works and delivered there to persons in the employ of the Government for that use was exempt from wharfage duty.

Cockburn, C. J., who delivered the judgment of the Court, says:—"I am of opinion that the decision of the Justices was right. There are two great principles which, from an early period of our history, have obtained with regard to the prerogative of the Crown: first, that the Crown is exempt from the payment of tolls; second, that, except in certain cases, the Crown is not bound by an Act of Parliament unless specially named in it. The question here is whether the Crown, acting through its servants, is liable, in respect of stone brought into the harbour of Weymouth for the use of the Government works, to the duties imposed by statute 6 Geo. 4, c. cxvi. The doctrine as to the immunity enjoyed by the Crown from payment of tolls arose in the time when tolls were leviable by virtue of a grant from the Crown, or by prescription, from which a grant from the Crown may be presumed, and it may be well assumed that when tolls were so granted the Crown did not intend to include itself in the liability to pay them. But whether or not that be the origin of the immunity, it has obtained from the earliest times, and we cannot suppose that the Legislature took upon itself to make the Crown liable to the payment of those duties without mentioning the Crown in the statute.

"Even supposing that those who represent the Crown could not succeed upon the first principle, I think the second concludes the case. The rule that the Crown is not bound by an Act of Parliament unless specially named in it applies in such a case as the present, where tolls or duties are taken under a local Act, so that this is not within the exceptional cases in which the Crown, though not named, is bound. Mr. Lush relies on section 23, which contains exemptions in favour of the Crown, but he insists upon the doctrine that the expression in a statute of certain exemptions leads to the

inference that it was intended by the Legislature that there should be no others. But the case falls within the principle laid down in Bac. Abr. Prerogative (E), 5, referred to in the argument, and we must suppose that the exemption was inserted *ex majori cautela*, with a view of pointing out to those charged with the collection of the duties the cases most likely to arise in which they were to abstain from demanding them."

It may be conceded that if the case applies on the first ground, it does so also on the second. But the real question is whether it applies at all.

In its reasoning it certainly does not. The right of the Crown and of all its subjects to use the sea within as well as without tidal or territorial limits for navigation and for landing lawful merchandize from ships on public wharfs, piers, quays, or roadways, is indisputable. An Act of Parliament fettering that right by a grant of toll, either thorough or traverse, is therefore *pro tanto* contrary to common right, just as a grant by the Crown of a right to tolls would be. In either case it is settled that the Crown is not liable to toll without more, since the Crown, in cases of grant or prescription, cannot be supposed to have intended to subject itself to tolls without express words, and in the case of a statute the Crown unless named is not bound on ordinary principles.

But if it be the case that the ferry service here is not of that character at all, that the public has no rights whatever in it save by contract, that the service could be stopped to-morrow, that it depends in no degree on the Royal prerogative, and derives no monopoly from Act of Parliament, there is not even an analogy between the *Mayor of Weymouth's Case* (1) and the present. In short, if I am to hold that the right claimed by the Crown exists, I should be inventing a head of the common law for which no foundation can be discovered in any of the sources or expositions of our jurisprudence with which I am acquainted.

It was argued that the word "toll" in the Act of 1877 does this by itself, and *proprio vigore*. That "toll" has a legal meaning; that it is when strictly used a word of art is no doubt true. But that it is often used in a sense other than that of the Year Books is also true. In Railway Acts and byelaws it is often employed

(1) 6 B. & S. 22.

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without involving the consequences claimed; and then it merely means rate of charge. It plainly has that meaning in the 24th section of the Act of 1877. It there means that the Commissioners when empowered to do what would otherwise be *ultra vires* are not to make any extortionate charges, or any charges at all in excess of those which could be exacted for the use of the bridge which replaced the ancient ferry (except as to foot passengers). These latter are no doubt properly described as "tolls," and so the same word is used in the later Act. But I see no colour of foundation for the argument that therefore the servants of the Crown are to be carried free, if no such right would have existed had the words been only "rates and charges." It would be odd if the whole question of the rights claimed for the Crown depended upon this use of the word "toll" in its context. In *Letton* v. *Godden* (1) the word "toll" was not used, but unless there is some magic in the word "toll," it cannot mean more than what I have said.

Mr. Samuels argued that on the words of this section there could be no right to charge "tolls" on Post Office servants or parcels, &c., because they went toll free over the upper roadway of the bridge under the Act of 1859, s. 64. But I think the reference to the tolls, rates, and charges (with a modification as to foot passengers) refers to the tolls, &c., in section 61, that is, no greater charge is to be made by the ferry than by the bridge in the specified instances. The exemption section is not in any way referred to. The charges are to be "*not exceeding*" those mentioned, and there is no express or implied mention of any exemption whatever. The reference is merely to the amount of the charges for specified goods or passengers, not to the persons who are to pay them, still less to any exemption from paying them, if the steam ferry boats are used.

In short, the bridge is there open for the Post Office servants. If they desire to use a shorter route, there is nothing to hinder them, so long as the ferry boats run, but on payment for the service. As I said during the argument, if the prerogative of the Crown extends to it, let a grant be made to M'Keever (for instance), and thus a right in the servants of the Crown will

(1) L. R. 2 Eq. 123.

attach to it, and the defendants can consider their position as to running or discontinuing their boats. But the Crown encourages M'Keever, and at the same time asserts a right to use the service which is crippled by his competition, whilst admitting that there is no legal ferry, in the strict sense, at the place. This I think cannot be done. The action must therefore be dismissed.

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Solicitor for the informant: *T. R. Baillie Gage.*
Solicitor for the defendant: *W. L. Gilliland.*

W. L.

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Jan. 17.

Appeal.

April 22.

Landlord and tenant—Lease for lives and years—Term of years, whether concurrent or reversionary.

A lease made the 23rd day of August, 1821, demised certain lands from the 25th day of March last for and during the life and lives of A B and C and the survivors and survivor of them, "and for and during the full end and term of ninety-nine years from thence next ensuing":—

Held, by the Court of Appeal (reversing the decision of the Master of the Rolls) that the term of ninety-nine years was concurrent and not reversionary, that it began to run on the 25th day of March, 1821, and not on the death of the surviving life.

O'Connor and Small's Contract (33 I. L. T. R. 43) overruled.

ACTION brought by the plaintiff for (1) a declaration that on the true construction of a lease dated August 23, 1821, and made between John Dawson Duckett, William Duckett, and Joseph Fade Duckett of the one part and Thomas Palmer of the other part, the terms thereby created were concurrent terms, and that the term of ninety-nine years thereby granted did not commence to run from the death of the survivor of the three lives therein mentioned; (2) a declaration that by the acts of the defendant and those through whom he claimed he was estopped from denying that the said terms were concurrent; (3) rectification (if necessary) of the said indenture of lease.

The claim as to estoppel and rectification raised no question of importance, and the evidence of the plaintiff dealing with this part of the case is omitted from this report.

The lease was dated the 23rd day of August, 1821, and made

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between John Dawson Duckett, William Duckett, and Joseph Fade Duckett of the one part and Thomas Palmer of the other part. It contained no recitals, and witnessed "that the said John Dawson Duckett, William Duckett, and Joseph Fade Duckett, for and in consideration of the yearly rent, reservations, covenants, and agreements hereinafter reserved, mentioned, and expressed, have demised, granted, set, and to farm, let, released, and confirmed, and by these presents do demise, grant, and to farm, let, release, and confirm unto the said Thomas Palmer (in his actual possession now being by virture of a bargain and sale to him thereof made by the said John Dawson Duckett, William Duckett, and Joseph Fade Duckett for the term of one whole year by indenture bearing date the day next before the day of the date of these presents in consideration of five shillings sterling and by force of the statute for transferring uses into possession) and to his heirs and assigns All That and Those two acres one rood and twenty-six perches of the lands of Cullenswood, etc., etc., To Have and To Hold all and singular the said demised premises Unto the said Thomas Palmer, his heirs, executors, administrators and assigns, from the 25th day of March last, for and during the natural life and lives of George Palmer, aged about 18 years, Thomas Palmer, aged about 16 years, and Isaac Palmer, aged about 12 years, and the survivors and survivor of them, and for and during the full end and term of ninety-nine years from thence next ensuing and fully to be completed and ended." The lease reserved in the usual form a rent of £24 per annum, and contained the usual covenant for payment of the same with the usual powers of distress and entry. There was also a covenant by the lessee to keep in repair, and to expend £200 in lasting improvements, and by the lessors for quiet enjoyment so far as their own acts or those of persons claiming under them were concerned.

All the interest of the lessors in the lease was at the date of the action vested in the plaintiff, and all the interest of the lessee was vested in the defendant.

O'Connor, K.C., *R. Barry, K.C.*, and *Moriarty*, for the plaintiff.

Hume, K.C., *S. L. Brown, K.C.*, and *Garrett Walker*, for the defendant.

The arguments and cases cited sufficiently appear from the judgments.

THE MASTER OF THE ROLLS:—

I continue to be of the same opinion as I was before on the construction of the instrument now before me. That was a decision, in 1898, on a vendor and purchaser summons, *O'Connor and Small's Contract*, which was acted on by the vendor and purchaser. It is reported in 33 I. L. T. R. 43, and was to the effect that the word "thence" was to be read as referring, not to the words "the 29th September last," but to the death of the survivor of the lives mentioned in the lease. I held that the term of years did not commence till after the expiration of the freehold lease, that is to say was reversionary, not concurrent. I do not hold myself responsible for the language I am reported to have used in that case. I did not say, "No doubt the construction put upon the language by the purchaser is grammatically the more correct." Had I used these words I should have gone on to put a different construction on the instrument from what I did. But I did not say that. There is an inaccuracy in the report in that respect. The lease is for a life aged fourteen, and ninety-nine years; so that, if the terms are concurrent, the term of the lease for lives can only be of value if the life survive 113 years, and then only for the term of that life. Obviously, the ages of the lives being stated in the lease, the intention of demising for the duration of a life supposed to exceed 113 years is absurd; but a lease in reversion is reasonable, and must have been what was intended, whatever criticism may be applied to the use of the word "thence."

I hold myself bound by what I decided in the former case, and adhere to the opinion I then expressed, and I must leave it to the Court of Appeal to decide whether I was right or not (1).

W. L.

(1) In *O'Connor and Small's Contract* the following judgment was, on the 19th December, 1898, delivered by THE MASTER OF THE ROLLS:—

The vendor's contention is, I am satisfied, the right one. No doubt, the construction put upon the language by the purchaser may be grammatical; but if you put aside the word "thence," everything points to a reversionary term, and that word itself, though it might not inaptly refer to the date mentioned at the beginning of the *habendum*, may be very well referred to the death of the last of the three lives, the idea of which, you can easily see, was present to

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April 22.

The plaintiffs appealed to the Court of Appeal (Fitz Gibbon, Walker, and Holmes, L.JJ.).

O'Connor, K.C., R. Barry, K.C., and *Moriarty,* for the appellant.

Hume, K.C., S. L. Brown, K.C., and *Garrett Walker,* for the respondent.

FITZ GIBBON, L. J. :—

We have to deal with a lease—an executed instrument—and not with an agreement; it must be construed according to its words; and no help to ascertain its legal effect can be obtained from the conduct of the parties, though it affords us the consolation of knowing that what we regard as the legal meaning of the deed was put upon it by those who held under it.

This assurance was executed in 1821, when conveyancing was more technical than it is now; it refers to the statute for transferring uses into possession, and it operated by way of lease and release in so far as it created an estate of freehold, and as a demise in so far as it created a term.

The *habendum* is unto Thomas Palmer, his heirs, executors, administrators and assigns, words applicable to both freehold and chattel. The demise runs "from the 25th day of March last." These words have no effect upon the duration of the freehold, because it came into existence on the execution of the lease, and its termination must coincide with the fall of the last life. The rent was to be computed "from the 25th day of March last." For how long was it to run? "For and during the natural life and lives of George Palmer, Thomas Palmer, and Isaac Palmer, and the survivors and survivor of them, *and* for and during the full end and term of ninety-nine years." The respondents rely on this word "*and*" as

the mind of the draftsman, though the language used is somewhat inaccurate in one particular respect. The case of *Blackhall* v. *Nugent* (5 Ir. Ch. R. 321) is the nearest to the present, and supports the vendor's contention. In the case before me there is nothing to indicate that the lives and years were to be concurrent; and the plain literal meaning of the clause is to the contrary. The ages of all the lives are given. No one could imagine that the lives could outlive a ninety-nine years' term, and on that basis the introduction of the lives would have been wholly and obviously futile. The summons must therefore be dismissed with costs. W. L.

showing that the term of years is additional to what was already given. But whether it is concurrent or reversionary, the term is additional; therefore the word "and" is not conclusive. When does the term begin? It is "*from thence* next ensuing." The case really depends on the meaning of "*thence*." "The 25th day of March last" is the only grammatical antecedent. No other commencement for the term can be got without reading something into the lease which is not there; viz. "from the death of the last survivor," or words of like effect. "Thereafter" might be ambiguous, because it might mean "after the expiration of the foregoing freehold" but "from thence" suggests the question—from *whence*? and the only grammatical answer is "from the 25th day of March last."

To hold the term reversionary would raise a further difficulty about the rent, which is made payable half-yearly on every 25th March and 29th September. Unless the term began on the "25th day of March last," it would end, not on a gale day, but on the 99th anniversary of the fall of the last life. I am not aware that in 1821 any Act was in force which would entitle the landlord to any rent for a broken period, or to recover less than a full half-yearly payment; but, be that as it may, the half-yearly gale days give some support to the argument that the term was intended to end on one of them, except in the negligible event of one of the lives surviving the ninety-nine years.

But passing from the letter of the document, other considerations tend, in my opinion, to favour the intention to create an immediate estate of freehold with a term of ninety-nine years concurrent, but suspended during the more dignified freehold rather than a reversionary term.

In Ireland two forms of lease are known in which years are added to lives. The years are more usually concurrent with the lives, but the term starts from the death of the last surviving life often enough to make it impossible to base a decision upon any presumption that the concurrent construction should prevail in a case otherwise doubtful. Leases for lives, as matter of history, were commonly adopted because of advantages with respect to the descent of the land, qualification for electoral and other purposes, and other things; and by naming lives these advantages were secured for a great part of the term, without sacrificing

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the advantage of fixing the time when the tenure would end. The law and authorities are practically Irish: Davidson's Precedents do not contain a lease in either form, though they include a lease for ninety-nine years determinable on the fall of three lives—a tenure almost unknown here. The inconveniences of a demise for three lives with a long reversionary term are very great, and there is no corresponding advantage; special provisions have been made by statute to meet the difficulty of proving the deaths of *cestuis que vie*; but this difficulty would be immensely increased if the proof did not become necessary, or ever producible, until ninety-nine years after the dropping of the last life.

The earliest case (1770) is *Lord Netterville* v. *Marshall* (1). It is not a decision on the point before us, and it is cited for an observation of Lord Lifford. The question was, whether an agreement for a lease for three lives or thirty-one years, *whichever should longest last*, could be executed under a power to make leases for three lives *or* thirty-one years in possession. The Lord Chancellor, who differed from Lord Annaly, thought that, as it was an agreement for a lease (not as here an executed lease) the intention of the parties should prevail, and that they intended to give and accept a term for three lives at all events. He adds:—

> "If the word 'or' in the *habendum* be changed for the word 'and,' there will be a perfect term of years concurrent with the freehold term, and such constructions were frequently made."

With all respect, the proposed change would be wrong, because "three lives *and* thirty-one years, whichever should longest last," would be bad English, and the observation is material only to show that terms of lives and years concurrent are frequent.

Jones v. *Duggan* (2) also arose upon articles of agreement for a lease for lives and years to commence *in futuro*, which was void as to the freehold. Its importance lies in the explanation by Burton, J. of the legal operation of such a demise. He incidentally shows that the concurrent interpretation is the primary one, and he also shows that "*and*" is appropriate, because the term of years, though concurrent, is additional:—

(1) Wallis, by Lyne, p. 80. (2) 4 Ir. L. R. 86.

"With respect to the intention of the parties, it is perfectly clear that the intention was to give the tenant a lease for three lives and for the lives and life of the survivors and survivor, and a *concurrent* term for thirty-one years; the operation of which expressed properly would be a freehold lease for three lives, with a contingent remainder of thirty-one years, to commence upon the 25th March next following the date of the instrument, but the years not to be in legal existence until the determination of the lives. Now it is quite true that this intention fails, by the grant for lives being to commence at a future time, and this makes the contract, so far as respects the lives executory, but that does not make it executory as respects the term of thirty-one years. The entire intention of the parties would be substantially effected by this construction; namely, that the lessee should have a freehold lease for the lives named, and a chattel interest from the 25th March then next after the execution of the instrument, and the term is not thereby merged, but merely suspended while the freehold interests subsists."

Blackhall v. *Nugent* (1), decided by Brady, C. in 1855, was a suit for specific performance of an agreement by Sir Peter Nugent to give "a lease for three lives *and* sixty-one years," the lessee to commence his tenancy at the expiration of an existing lease, and paying a large fine at the date of the agreement. No lease was executed, and the existing lease did not expire in the lifetime of Sir Peter Nugent. After his death his devisees for life carried out his agreement by making a lease for three lives with a reversionary term of sixty-one years. After their deaths the remainderman sought to impeach the lease, as not being within the terms of the agreement. Brady, C. decided the case on the intention of the parties; he acted on evidence, such as the fine, not admissible for the interpretation of an executed deed, and he said that, even upon an agreement, specific performance might have been difficult if Sir P. Nugent was before the Court, and insisted that he had been misled by the form of expression used. He treated the acts of the tenants for life in granting a lease and acting on the petitioner's construction, as evidence that they considered themselves bound by the words to grant the larger estate, and he held that there was nothing to deprive the words of what he held to be "their natural meaning."

We have much stronger evidence here, if it were admissible,

(1) 5 Ir. Ch. Rep. 323

Appeal. 1902. DUCKETT v. KEENE. Fitz Gibbon, L.J.

that every one acting or holding under this lease treated the term as concurrent; the sub-leases were all kept within the period which a concurrent term would allow. Brady, C. did not lay down that the words *necessarily* imported a reversionary term in *Nugent's Case* (1), for he says :—

> "It is true that the case of *Vignolles* v. *Bowen* (12 Ir. Eq. Rep. 194) shows that a concurrent term of years may be taken as satisfying the construction of words like these. A lease for lives with a concurrent term, however, is not, properly speaking, in contemplation of law a lease for lives and years, as it does not confer on the same person the freehold and chattel interest."

This is not so, if Burton, J. is right; nor unless we add the the qualification "*at the same time.*"

Vignolles v. *Bowen* (2) was decided in 1847 by Smith, M.R., who held that the description of a lease as being for three lives and thirty-one years, when in fact it was a lease for three lives and only so much of the thirty-one years as might be in existence after the death of the survivor, was not such a misdescription as entitled a purchaser to be discharged. He did not dispose of the case on the evidence of misleading, but on the construction of the rental. He said :—

> " Leases for three lives and thirty-one years concurrent are common in this country, and the legal operation of such leases is that the lessee holds for the three lives and for so many of the years, if any, as shall be unexpired at the death of the surviving life. Lord Tenterden adverts to such leases in *Long* v. *Rankin*, reported in the Appendix to Sugden on Powers (2 Sug. on Powers App., p. 513); and I do not think that I am to construe the rental as describing the thirty-one years to be a term to take effect for that period at the death of the surviving life, so as to raise a question of misdescription."

The importance of that case here is the decision that there was nothing to warrant a purchaser in assuming that a lease for lives *and* years is for consecutive and not concurrent terms.

Lastly, we have *O'Connor and Small's Contract* (3), decided in 1898 by the Master of the Rolls on a vendor and purchaser summons in respect of a sale of part of the lands comprised in this

(1) 5 Ir. Ch. Rep. 323. (2) 12 Ir. Eq. Rep. 194. (3) 33 I. L. T. R. 43.

very lease, and held under a sub-lease containing the same terms. The Master of the Rolls said:—

> "*If you put aside the word 'thence,'* everything points to a reversionary term, and the word itself, though *strictly referable* to the date mentioned at the beginning of the *habendum*, may very well be referred to the death of the last of the three lives, the idea of which you can easily see was present to the mind of the draftsman, though *the language used does not give actual expression to it.*"

It is to be regretted that the question first arose in a summary way, and that the Master of the Rolls, when it was more fully discussed, was practically bound by his previous decision. But I cannot think that we are at liberty to "put aside the word 'thence,'" nor to apply it to any date except that to which it is "strictly referable," nor can I see that any idea was present to the mind of the draftsman to which the language used did not give actual expression, and, for the reasons which I have given, the language of this deed is, in my opinion, best satisfied by holding that the term of years ran from the 25th March, 1821, and was therefore concurrent with the lives.

WALKER, L. J.:—

I concur.

HOLMES, L. J.:—

There is a manifest fallacy in the argument addressed to us on behalf of the defendant. It is assumed that if the term of lives and the term of years are concurrent no force is given to the word "and." Now whether the terms are concurrent or the term of years begins when the last surviving life falls the proper connecting word is "and"; and "or" would be ungrammatical and inaccurate. In neither case would the terms be alternative. In both cases the terms would be cumulative. The sole question is at what date does the term of years begin to run. I am unable to refer the words "thence ensuing" to any period except the only date specifically named—the 25th day of the previous March.

Solicitor for the plaintiff: *Joseph E. Macdermott.*
Solicitors for the defendant: *M'Mahon & Tweedy.*

G. Y. D.

V.-C.
1903.
May 15, 16.

COPE *v.* BRESLIN.

(1897. No. 786.)

Revenue—Finance—Estate duty on settled property—Payment by executor—Right of recoupment—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *sections* 1, 2, 4, 7, 8, 9, 14.

B mortgaged certain property to secure the payment of a sum of £10,000 to a son of a first marriage, with a proviso that the principal sum was not to be called in during B's life, if interest at 5 per cent. was punctually paid during his life. The mortgage shortly afterwards, on the occasion of the son's marriage, was vested in the trustees of his settlement. A few years afterwards, on the occasion of his second marriage, B agreed to bring into settlement property of sufficient value to produce £500 a year. Certain property was actually brought in at the time and settled on the usual trusts, which, however, proved to be only worth £297 a year. By his will B devised the residue of his property, after payment of his funeral and testamentary expenses, to his executors on trust. On B's death his estate was administered in Court. By an order of the Court leave was given to the trustees of the second settlement to prove for a sum of £6800 to make good the deficiency in the value of the property brought by B into the aforesaid settlement. The estate proved insolvent.

The Revenue authorities, in assessing the "principal value" of the property for the purpose of the payment of estate duty, declined to allow credit for the aforesaid sums secured by the above-mentioned settlements. The estate duty was paid by the executor, who claimed the right to be recouped by the trustees of the respective settlements a proportionate part of the duty on the sums realized by them on foot thereof:—

Held, that the executor was entitled to be so recouped.

This was a question arising in the course of the administration of the estate of Mr. Edward Breslin, of Bray, county Wicklow, who died on the 7th June, 1897. The deceased was possessed of considerable property both real and personal, but his estate proved insolvent.

On the 28th March, 1872, the deceased executed a mortgage for £10,000 of certain premises, known as Marine-terrace, Bray, in favour of his son by his first marriage, Edward W. Breslin,

the consideration for same being natural love and affection. The mortgage deed contained a covenant on the part of the deceased to pay to the said Edward W. Breslin on the 28th of September next following the date of the mortgage the said sum of £10,000, with interest, for the same in the meantime at the rate of 5 per cent. per annum *without any deductions*. There was also a proviso in the following terms:—"Provided always, and it is hereby agreed upon between the parties hereto, that in case the said Edward Breslin, his executors, administrators and assigns, shall duly keep and perform all and singular the covenants on his and their part to be paid and kept and performed, then it shall not be lawful for the said Edward William Breslin, his executors, administrators or assigns, to call in or require payment of the said sum of £10,000, or any part thereof, during the natural life of the said Edward Breslin."

On the 21st December, 1872, a settlement was executed on the occasion of Edward William Breslin's marriage, and the said mortgage was brought into settlement. The premises comprised in this mortgage were sold by order of the Court, and the trustees of the settlement had at the date of the present proceeding realized on foot of the mortgage the sum of £6442 19*s*.

On the 14th August, 1877, the deceased, upon the occasion of his second marriage, agreed to bring into the settlement executed thereon property amounting in value to £500 per annum, and in accordance with that agreement certain real property, consisting of lands and premises situated in Bray, county Wicklow, which were believed to be of that value, was assigned to the trustees of the settlement upon the usual trusts. The property, however, proved only to be worth about £297 per annum. The matter was referred to the Chief Clerk to ascertain the amount of the deficiency, and by an order of the Court the trustees of the settlement were allowed to prove for the sum of £6800, the amount fixed by the Chief Clerk.

By his will, dated 13th February, 1897, the deceased disposed of all the rest, residue, and remainder of his property of every kind, real and personal, subject to, and after the payment out of any personal estate, or in case of deficiency, out of his real estate, of his funeral and testamentary expenses, debts, and legacies, to the use

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of his executors, upon trusts therein declared. Probate of the will was granted to Albert Edward Harold Breslin, one of the executors named therein.

In estimating the principal value of the deceased's estate for the purpose of the payment of estate duty thereon, the Revenue authorities refused to allow any deduction in respect of the mortgage of 1872 or the settlement of 1877.

The present summons was taken out by the said Albert Edward Harold Breslin, who applied for an order to have it declared that James C. Bennett, John Findlater, and William Findlater, junior (the trustees of the settlement of 1872), be declared liable to recoup the testator's estate in respect of the estate duties, such a sum as would represent £4 per cent. on the sum of £6442 19*s.*, already paid to them on foot of the said debt, and £4 per cent. on any further sum which might thereafter be paid to them on foot thereof; and that James Raverty and Thomas Henry Hodgens (the trustees of the settlement of 1877) should be declared similarly liable in respect of estate duties on the sum which might be paid to them on foot of their debt of £6800.

O'Connor, K.C., and *Henry Richards*, for the executor:—

The trustees of the mortgage of 1872 and of the marriage settlement of 1877 are bound to recoup the executor a rateable proportion of the estate duty paid by him to the Revenue authorities. Under the Finance Act, section 7, sub-section 1 (*a*), in determining the value of an estate for the purpose of estate duty allowance should be made for debts and incumbrances where such debts and incumbrances were created *bona fide* for full consideration in money or money's worth wholly for deceased's own use and benefit, and which take effect out of his interest. Marriage is not a consideration for money's value within the meaning of the section: *Attorney-General* v. *Lord Rathdonnell* (1). By section 9, sub-sect. (1), a rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, is made a first charge on the property in respect

(1) 32 L. R. Ir. 574.

of which duty is leviable. By sub-section (4) of the same section, if the rateable part of the estate duty in respect of any property is paid by the executor, it shall when occasion require be repaid to him by the trustees or owners of the property. The case of the executor is, that only the equity of redemption, which was valueless, passed to the executor as such, and that any duty payable in respect of the mortgage debt became, under section 9, sub-sect. 1, a first charge on the property comprised in the said mortgage, and that under sub-section 4 of the same section, having been paid by the executor, it became payable to him by the trustees in whom the mortgaged property was vested.

With respect to the property of the deceased brought in by order of the Court as part of Mrs. Breslin's marriage settlement, the same must be regarded as having been brought in at the date of the settlement itself, and any duty payable thereon must be subject to all the incidents which would govern the payment of duty if the property were so originally settled. Property originally settled plainly did not pass to the executor as such, and he having paid the duty, is entitled to be recouped the amount so paid (see section 9, sub-sect. 4, and section 14).

Blood, K.C., and *Edward Kenny*, for the trustees of the mortgage of 1872:—

The executor is bound to pay the estate duty on the amount coming to the trustees of the mortgage of 1872 out of the general estate. Section 1 of the Finance Act provides for the payment of estate duty upon the principal value of all property, real or personal, settled or not settled, and by section 2, sub-sect. 1 (*a*) property includes property of which the deceased was competent to dispose at the time of his death.

Our contention is that the property comprised in this mortgage was property of which the deceased was competent to dispose at his death, and he did actually dispose of it by his will. "Competent to dispose" means that he had such an estate or interest therein as would enable him to dispose of the property. Here the executor could dispose of the equity of redemption which became vested in him at the death of the testator. Section 7 provides for the ascertainment of the principal value of property passing at the

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death, and whether the property is free or incumbered, it must be accounted for in the first instance. Only debts and incumbrances for money's value can be deducted. Protection is given to executors by the closing words of section 8, sub-sect. 3, which provides that the executor shall not be liable for any duty in excess of the assets he has received. Section 9 has no application to the present case, as it only deals with property which does *not* pass to the executor as such. In the present case the property clearly passed to the executor as such, and the duty is payable out of the general estate: *Gray* v. *Gray* (1). Apart from the provisions of the Finance Act, the mortgage provides for the payment of the principal sum "without any deductions," and these words constitute an indemnity against estate duty: *Re Parker Jervis, Salt* v. *Locker* (2); *In re Maryon Wilson* (3). An executor cannot be in a better position than the deceased himself would be if alive.

Pim, for the general creditors:—

The duty should not come out of the general estate. The case of *In re Maryon Wilson* (3) has no application. In it there was merely a covenant to pay money without deduction, and it was not a case of mortgage as here. In the case of a mortgage, section 9, sub-section 1, of the Finance Act makes the duty a first charge on the mortgaged property, but a mere covenant to pay does not fall within its provision. All that passed to the executor was in fact a worthless equity of redemption.

Wakely, K.C., and *Hunt*, for the trustees of Mrs. Breslin's marriage settlement:—

The deceased covenanted to bring into the marriage settlement a sum sufficient to produce £500 a year, and he failed to do so. The balance ordered by the Court to be brought in to make good the deficiency is in the nature of a judgment debt, and cannot be treated as subject to the trusts of the settlement. The case therefore falls within *Gray* v. *Gray* (1), and the estate duty should come out of the general estate.

By his will deceased directed his testamentary expenses to be

(1) [1896] 1 Ch. 620. (2) [1898] 2 Ch. 643. (3) [1900] 1 Ch. 565.

paid out of his residuary estate. The expression "testamentary expenses" includes estate duty: *In re Clemow, Yeo* v. *Clemow* (1); *In re Treasure, Wild* v. *Stanham* (2). *In re Dixon, Penfold* v. *Dixon* (3), is, however, a decision *contra*. [They also cited *Cook* v. *Culverhouse* (4).]

O'Connor, K.C., in reply:—

As regards the contention put forward by the trustees of the mortgage of 1872, it should be pointed out that this is a case of a mortgage and not of merely a covenant to pay a certain sum, as in *Gray* v. *Gray* (5).

As regards the second branch of the case, it is attempted to answer our contention by treating the fund as a judgment debt. It is a judgment debt in a certain sense, but it is a debt of a very special character. If the deceased had himself brought in the balance, the trustees of the settlement of 1877 would have been liable for estate duty in the same way as they are liable in respect of the part actually brought in, and which they have actually paid. The balance must be subject to the same liability as to estate duty, as if the deficit had been made good at the proper time. The balance is in lieu of settled money in which the deceased had a life interest, and it is therefore property passing on his death within the meaning of section 9, sub-sect. (4), and section 14 of the Act.

THE VICE-CHANCELLOR held that the executor was entitled to be recouped by the trustees of the respective settlements a proportionate part of the estate duty as asked for in the summons.

Solicitors for the executor: *Reeves & Sons.*

Solicitors for the other parties: *Findlater & Co., Goodbody,* and *Shannon.*

J. MAC M.

(1) [1900] 2 Ch. 182.
(2) *Ibid.* 648.
(3) [1902] 1 Ch. 248.
(4) [1896] 2 Ch. 251.
(5) [1896] 1 Ch. 620.

Appeal.
1902.

June 10.

M'CANN, Tenant; LORD O'NEILL, Landlord (1).

Landlord and tenant—Land Law (Ireland) Acts, 1881-1896—*Commencement of statutory term—Land Law (Ireland) Act*, 1881, *ss.* 4, 8—*Land Law (Ireland) Act*, 1887, *s.* 5—*Land Law (Ireland) Act*, 1896, *s.* 3.

A yearly tenant, whose rent was payable on May 1 and November 1 in each year, served an originating notice, seeking to fix a fair rent for the first statutory term on October 4, 1887. The fair rent was fixed by an order dated March 31, 1888. The tenant served an originating notice, seeking to fix a fair rent for the second statutory term, on December 10, 1901. The landlord served notice to dismiss the originating notice as premature:—

Held (affirming the decision of the Irish Land Commission), that the originating notice was not premature, and that the statutory term as well as the judicial rent began to run, under sect. 5 of the Act of 1887, from November 1, 1887.

Appeal by the landlord from an order of the Irish Land Commission dated March 25, 1902 (36 I. L. T. R. 95). The facts appear sufficiently from the headnote.

Ronan, K.C., and *F. N. Greer*, for the appellant.

Serjeant Dodd, and *R. F. Todd*, for the respondent.

Lord Ashbourne, C.:—

This case raises a novel point. The tenant, who held his holding under a yearly tenancy, paying his rent on May 1 and November 1 in each year, on October 4, 1887, served an originating notice seeking to fix a fair rent, and a fair rent was fixed on this application by an order of the Land Commission dated March 31, 1888, and ascertaining the fair rent to be £31 per annum. On December 10, 1901, the tenant served an originating notice seeking to fix the fair rent for the second statutory term. The landlord moved to set aside this originating

(1) Before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L. JJ.

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M'CANN, *Tenant;* O'NEILL, *Landlord.*

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notice as premature, and the Land Commission refused the motion. From their order this appeal is taken.

When the fair rent was fixed the governing section was section 5 of the Act of 1887, which prescribes that "when the Court on application fixes a judicial rent for a holding, the judicial rent shall be the rent payable by the tenant of the holding as from the gale day next after the making of the application," which has been held to mean the service of the originating notice and not the hearing in Court. But the landlord argues that although under this section the judicial rent commences from the gale day next after the service of the originating notice, there is nothing in the section to alter or repeal the provision in section 8, sub-section 3, of the Act of 1881, that the statutory term shall commence from "the rent day next succeeding the day on which the determination of the Court has been given," and that therefore while the judicial rent began to run in the present case from November 1, 1887, the first statutory term did not begin to run until May 1, 1888, and will not end until May 1, 1903; so that the second originating notice served on December 10, 1901, is premature having regard to section 8, sub-section 8, of the Act of 1881, which enacts that "during the currency of a statutory term an application to the Court to determine a judicial rent shall not be made except during the last twelve months of the current statutory term."

It is admitted that under the Act of 1881 the judicial rent and the statutory term commenced to run from the same date—"the rent day next succeeding the day on which the determination of the Court has been given." It is admitted that under the Act of 1896 also the judicial rent and the statutory term are coterminous, but it is argued that it is otherwise under the provisions of the Act of 1887, and that in cases to which that Act applies the judicial rent begins to run at one date and the statutory term at another. I am unable to arrive at any such conclusion. When an earlier Act says that both the fair rent and the term during which it is to run are to commence from the same date, it would be a startling result that the language of an amending Act, forming part of the same code, altering the date from which the fair rent was to run, should be so construed as to

Appeal. 1902. M'CANN, *Tenant;* O'NEILL, *Landlord.* Lord Ashbourne, C.

put one date for the commencement of the fair rent and another for the commencement of the statutory term. If we were to deduce from the words of the Act such a conclusion—so plainly at variance with its other provisions—it would only be because we were coerced by some express direction of the Legislature. But there is no such express direction.

I read section 5 of the Act of 1887 as amending the provisions of section 8 of the Act of 1881, which fixed the starting point of the judicial rent and statutory term at the same moment. Section 5 enacts that henceforward the judicial rent is to start from the gale day after the making of the application to fix the fair rent. No doubt it does not specifically mention the commencement of the statutory term, but in my opinion, having regard to the previous legislation, it implies that the statutory term and the fifteen years of judicial rent are to run together from the gale day next after the service of the originating notice.

In my opinion, the decision of Meredith, J., is right, and should be affirmed.

FITZ GIBBON, L. J.:—

The Act of 1881 made both the judicial rent and the statutory term, in the case of "first occasion" applications, run from the gale day next succeeding the date when the Act came into force; and, in the case of all other applications to fix fair rents, from the gale day next following the date of the decision of the Court. The Act of 1887 provided that the judicial rent should run from the gale day next following the date of the application to the Court. The Act of 1896 prescribes that both the judicial rent and the statutory term shall begin from the gale day next after the date of the application. Mr. Ronan's argument is that the fair rent in this case, being fixed under the Act of 1887, came to an end fifteen years after the gale day next following the date of the application, but that, as the Act of 1887 did not expressly alter the provision of the Act of 1881 as to the commencement of the statutory term, that term did not begin to run until the gale day next following the decision of the Court, and accordingly will not end until May 1, 1903.

What is the nature of a "statutory term"? It is not a term

of years for or during which there is a demise. It is only a period during which the jurisdiction to fix a judicial rent is suspended. When the Act of 1887 altered the date from which the fair rent was to run, by implication it altered the period when the jurisdiction to reconsider that rent would arise—*i.e.* it altered the date of the commencement of the period of fifteen years during which the fair rent was to remain fixed. The leading provision of the Act of 1887 was to enable fair rents to be fixed in certain cases which were excluded from the Act of 1881, and coupled with this leading provision we find a subsidiary provision, that in all cases the judicial rent shall run from the gale day next following the date of the application to the Court, no mention being made of the statutory term. The only interpretation which I can give to such legislation is that, in the absence of any express provision to the contrary, when the date of the commencement of the Court-fixed rent is defined, the commencement of the period of fifteen years during which the Court cannot interfere again is, by implication, defined to be the same date. The statutory term and the period during which the statutory fair rent is to run must be conterminous.

I think that the conclusion is the same as in the agreement cases, *Dunne* v. *Knolles* (1) and *Fulton* v. *Templetown* (2): viz. that the date of the commencement of the statutory term is, in every case, to be regulated by the date of the commencement of its essential incident, the judicial rent.

WALKER, L.J.:—

I concur. The matter appears clear. Section 4 of the Act of 1881 enacts that when the landlord demands an increase of rent from the tenant, and the tenant accepts such increase, until the expiration of the term of fifteen years from the time when such increase is made, "in this Act referred to as a statutory term," such tenancy is to attract the statutory conditions. Thus, when the rent is altered without the intervention of the Court the Act plainly makes the alteration in the rent the basis and starting point of the statutory term, and the conditions thereupon attracted

(1) [1898] 2 I. R. 308. (2) *Ibid.* 321.

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M'Cann, *Tenant*; O'Neill, *Landlord.*

Walker, L.J.

are elaborately stated in section 5, one of them being that the rent is to be fixed as increased, without alteration, for fifteen years. When we come to the provisions relating to the fixing of the rent by the intervention of the Court in section 8 we find the consequences of fixing a judicial rent are described by reference to the provisions relating to increase of rent by agreement. For our purpose the essence of those provisions is that for fifteen years from the commencement of the new rent there is no power to interfere with it, and the new rent when a judicial rent and the statutory term are both to run together from the gale day next following the decision of the Court. The Act of 1887 deals expressly with the judicial rent only, but its provisions are to be read into the Act of 1881.

It is true that in the two judicial agreement cases we were not dealing with the point now before us, but the reasoning in those cases applies here.

Holmes, L.J.:—

The 5th section of the Land Law (Ireland) Act, 1887, may be open to criticism, but its meaning is reasonably clear, and I think no question would have arisen on it were it not for its repeal and practical re-enactment in the statute of 1896.

It is impossible consistently with the scheme of all the legislation on this subject to make the statutory term to run from any other date than that from which the fair rent of the holding becomes payable; and when by the Act of 1887 this date was altered from the rent day next ensuing the decision to the gale day next after making the application, this carried with it a corresponding change in the commencement of the statutory term. In *Fulton* v. *Templetown* (1) the question principally discussed was the date from which the fair rent was payable, but it was assumed by the Court that once this was determined the statutory term would be regulated thereby.

Solicitors for the appellant: *R. & H. Orr.*
Solicitor for the respondent: *J. K. Currie.*

G. Y. D.

(1) [1898] 2 I. R. 321.

IRISH LAND COMMISSION *v.* ANNESLEY.

(1902. No. 183.)

M. R.
1903.
April 23, 24, 28, 29.

Tithe rentcharge—1 & 2 *Vict. c.* 109, *ss.* 7, 9—*Charge on "perpetual estate," not on fee-simple.*

Tithe rentcharge is a burden on the first estate of inheritance, and not on the fee-simple of the lands, unless the fee-simple is or becomes the first estate of inheritance.

Accordingly, where the owner of a lease for lives renewable for ever, who, as owner of an estate equivalent to a perpetual estate, was liable to pay the tithe rentcharge, assigned his interest, to avoid liability for future rent, to a pauper, and default was made in payment of the tithe rentcharge by the assignee, it was held that the arrears of the rentcharge could not be recovered from the owner in fee.

TRIAL OF ACTION.

This was an action to recover tithe rentchange. The facts of the case were set out in the statement of claim as follows:—

1. On or about the 12th day of September, 1827, a statutable composition for all tithes payable within the parish of Ballysax, in the diocese of Kildare and county of Kildare, was duly made, and the entire annual amount thereof was fixed and ascertained by a certain certificate dated the 26th day of October, 1826, and duly signed by certain Commissioners in that behalf duly appointed, and the said amount of composition was by the said certificate certified to be payable to the ecclesiastical person therein named as by the said certificate to which the plaintiffs refer will appear.

2. On or about the 2nd day of January, 1834, a statutable composition for all tithes payable within the parish of Tully, in the diocese of Kildare and county of Kildare, was duly made, and the entire annual amount thereof was fixed and ascertained by a certain certificate dated the 28th day of October, 1833, and duly signed by certain Commissioners in that behalf duly appointed, and the said amount of composition was by the said certificate

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certified to be payable to the ecclesiastical person therein named as by the said certificate to which the plaintiffs refer will appear.

3. The said annual amounts of composition were afterwards duly assessed and applotted on each and every parcel of the titheable lands of the said parishes respectively, and the said applotments were duly entered in certain books duly signed in that behalf.

4. By reason of the premises and by force of the statute 1 & 2 Vict. c. 109, part of the lands of Ballysax Hills, containing 104A. 0R. 15P. or thereabouts, in the said parish of Ballysax, became and are liable to and charged with the annual tithe rentcharge of £2 16*s.* 2*d.*, and part of the lands of Moortown, containing 20A. 3R. 35P. or thereabouts, in the said parish of Tully, became and are liable to and charged with the annual tithe rentcharge of 15*s.* 4*d.*, and such tithe rentcharges are payable by two equal half-yearly payments on the 1st May and 1st November in each year.

5. By reason of the premises and by force of the "Irish Church Act, 1869," the Commissioners of Church Temporalities in Ireland became on the 1st January, 1871, entitled to the said rentcharges, and on the said date the same became and were payable to them.

6. By reason of the premises and by force of the "Irish Church Act Amendment Act, 1881," and of a certain Order in Council made thereunder and dated the 12th September, 1881, the said rentcharges and all the estate and interest therein of the Commissioners of Church Temporalities in Ireland on the 13th September, 1881, became and the same are now vested in the plaintiffs.

7. The defendant Charles Dudley Joynt Annesley, under the provisions of an indenture dated the 28th day of August, 1846, and made between Richard Joynt Annesley of the first part, Robert Joynt Annesley of the second part, John Hughes and David Kelly of the third part, and James Grant and William Hughes of the fourth part, and in the events which have happened, was at the times of the accruing due of the arrears in the 13th paragraph mentioned and still is seized (subject to a term of 500 years created by the said indenture and thereby vested in certain

trustees for raising divers charges) of an estate in tail male in possession in the said lands of Ballysax Hills, which lands are held under a fee-farm grant dated the 6th day of June, 1851, from the Right Hon. Arthur Lord Valentia to the said Richard Joynt Annesley in lieu of a lease for lives renewable for ever, dated 12th day of March, 1743, and was at the times aforesaid and still is seized subject as aforesaid of a like estate in the said lands of Moortown, which said last mentioned lands are held in fee-simple.

7A. Previous to the accruing due of the said arrears, the said term of 500 years became, and the same is now, vested in the defendants John Cornwall and William St. George Perrott, upon the trusts declared by the said indenture of the 28th day of August, 1846.

8. Previous to and at the date of the indenture in the 10th paragraph mentioned John Howard Parnell held the said parts of the aforesaid lands of Ballysax Hills and Moortown under a sub-lease dated the 19th day of August, 1806, from Charles Annesley to James Critchley for lives renewable for ever (being such an estate and interest as rendered the lessee thereunder liable to the payment of the said tithe rentcharges) at the yearly rent of £75 17*s.* 1½*d.* late Irish currency, equivalent to £70 0*s.* 5*d.* present currency, and he and his predecessors in title from time to time duly paid the said tithe rentcharges to the plaintiffs.

9. At the times in the last paragraph mentioned Anne Daly held the said parts of Ballysax Hills and Moortown respectively as tenant from year to year to the said John Howard Parnell at the yearly rent of £70 0*s.* 4*d.*, and the said tenancy is still subsisting and is vested in her, and she is in occupation of the said premises under the same.

10. By an indenture dated the 12th day of March, 1896, and made between the said John Howard Parnell of the one part and John Giffney, labourer, of the other part, the said John Howard Parnell for a nominal consideration granted unto the said John Giffney, his heirs and assigns, the said parts of Ballysax Hills and Moortown for the lives in the said lease of the 19th day of August, 1806, named and such lives as might from time to time be added thereto.

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11. The estate of the said John Giffney in the said parts of the said lands is valueless, and he has no other means. Notices under the provisions of the Landlord and Tenant Law Amendment Act (Ireland), 1860, have from time to time been served by the agent of the defendant Charles Dudley Joynt Annesley and the receiver over his estate on the said Anne Daly, requiring her to pay to such agent or receiver the rent payable by her to the said John Giffney in discharge of the rent payable by him to the said defendant, and the said Anne Daly has paid and continues to pay her rent direct to the said agent or receiver in manner aforesaid.

12. Applications were from time to time made by the plaintiffs to the said John Howard Parnell and John Giffney for payment of the arrears in the next paragraph mentioned according as the same became due, but they did not pay the same.

13. There is now due to the plaintiffs in respect of the said tithe rentcharge of £2 16*s.* 2*d.* the sum of £15 13*s.* 10*d.*, being six years' arrears thereof after all deductions up to the 1st day of November, 1901, and in respect of the said tithe rentcharge of 15*s.* 4*d.* the sum of £4 7*s.* 5*d.*, being six years' arrears thereof after all deductions up to the date aforesaid.

14. Under the circumstances aforesaid proceedings against the said John Giffney or his estate and interest in the said lands would prove fruitless and abortive, and the plaintiffs have no remedy for the recovery of the said tithe rentcharges and arrears save this action.

15. The plaintiffs have applied to the receiver over the estate of the defendant Charles Dudley Joynt Annesley for payment of the said arrears, but he refuses to admit any liability of the said estate for the said arrears or the accruing gales of the said tithe rentcharges.

The plaintiffs claimed—

1. A declaration that the fee and inheritance of that part of the said lands of Ballysax Hills, containing as aforesaid 104A. 0R. 15P. or thereabouts and the estate and interest of the defendants therein, are liable to and charged with the payment to the plaintiffs of the said tithe rentcharge of £2 16*s.* 2*d.* and the arrears thereof.

2. That the fee and inheritance of that part of the said lands

of Moortown, containing as aforesaid 20A. 3R. 35P. or thereabouts and the estate and interest of the defendants therein, are liable to and charged with the payment to the plaintiffs of the said tithe rentcharge of 15*s.* 4*d.* and the arrears thereof.

3. That there is due to the plaintiffs in respect of such arrears the sums of £15 13*s.* 10*d.* and £4 7*s.* 5*d.* respectively up to the 1st November, 1901, after all deductions.

4. That the said arrears and accruing gales of the said tithe rentcharges may be raised by sale of or the appointment of a receiver over the said parts of the said lands respectively, or that the receiver already appointed over the same may be extended to the plaintiffs' claim in respect of such arrears and accruing gales.

The defendant Charles Dudley Joynt Annesley, being a minor, by his statement of defence submitted his rights and interests to the Court, and objected that the plaintiffs' claim was bad in law and not maintainable against the defendant, and relied on the statute 1 & 2 Vict. c. 109, s. 9. The defence of the other defendants raised the same objection in point of law. At the hearing the conveyance of March 12, 1896, from J. H. Parnell to John Giffney was proved, and also the fact that John Giffney was a pauper, and that the conveyance to him had been made by J. H. Parnell on the advice of his solicitor to get rid of liability for rent.

Matheson, K.C., *Henry, K.C.*, and *M'Carthy Mahony*, for the plaintiffs :—

Composition for tithe was first established in 1823 by 4 Wm. 4, c. 99, commonly known as Goulbourn's Act. It was payable by the occupier, but was charged on the fee, sect. 34, and was in preference to any other charge on the lands, whether for rent or otherwise, sect. 38. It lasted for twenty-one years only. In 1832, by 2 & 3 Wm. 4, c. 119, commonly known as Stanley's Act, the composition was made permanent, and was payable by the person who had a greater estate than a tenancy from year to year, which was declared exempt, and on the determination of that estate by the next estate, sect. 12; power to appoint a receiver was

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given to a Court of Equity to enforce arrears, sect. 15. In 1838 1 & 2 Vict. c. 109 was passed to abolish composition for tithes and to substitute rentcharges in lieu of it; the preamble recites that these are to be payable by persons having a perpetual estate or interest in the lands subject thereto. All lands subject to payment of tithe composition are then charged with a rentcharge payable by the person having the first estate of inheritance in the lands, or what is deemed equivalent to such estate, sect. 7, which includes any estate or interest held under any deed containing a covenant for perpetual renewal, *e.g.* a lease for lives renewable for ever, sect. 8. The effect of the Act is that the charge issues out of the inheritance; but a particular person is put forward as liable to pay it. Section 9 contains a limitation that, in the event of the forfeiture, surrender, or other determination of such estate, the amount of one year's arrears of rentcharge is to be "a charge on the lands subject to the payment of such annual rentcharge." Otherwise all arrears then due would be a charge on the fee. The word "charge" is first used in this section. The fee is a surety for all minor estates in the land for payment of the charge. Section 27 makes the rentcharge have priority over all other charges affecting the lands chargeable therewith, and provides that it may be recovered by bill in equity, action of debt, or civil bill.

In *Saunderson* v. *Stoney* (1) and *Madden* v. *Wilson* (2) it was held that where a receiver was appointed on a summary petition under section 30 of the Act he was bound to pay the tithe rentcharge before any other charges, and even before the head rents payable in respect of the responsible estate by the owner over whose land he had been appointed. These cases are discussed in *Commissioners of Church Temporalities* v. *Harrington* (3), where the Vice-Chancellor held that, having regard to Deasy's Act and to the terms of his lease, the tenant in occupation was justified in applying his rent to payment of head rent instead of paying it to the receiver appointed to collect the tithe rentcharge, but the application of the plaintiffs there for a sequestration against the tenant was unsustainable in form. *Commissioners of Church Temporalities* v. *Grant* (4) may be relied on by the defendants, but the

(1) 2 Ir. Eq. R. 153.
(2) 6 Ir. Jur. (O. S.) 129.
(3) 11 L. R. Ir. 127.
(4) *Ibid.* 430.

observations of Law, C., and Palles, C.B., were not necessary to the decision.

Fleming, *K.C.*, and *Oulton*, for the defendants:—

Section 12 of 2 & 3 Wm 4, c. 119, relied on is against the plaintiffs' contention, as it made the liability devolve from one estate to another. The intention of the Tithe Rentcharge Act of 1838 was to create a new rentcharge: *Irish Land Commissioners* v. *Grant* (1), per Selborne, L.C., at p. 32, affirming the decision of the Court of Appeal in *Commissioners of Church Temporalities* v. *Grant* (2). Section 7 of the Act puts this rentcharge on what has been called the responsible estate, viz. the perpetual estate as defined by the Act, not on the fee, "according to the quantity of such lands comprised in each such estate or interest." "Such estate" means such perpetual estate. This is clear from the words of the proviso in the section, "the lands comprised in each such estate or interest." The charge is on the responsible or perpetual estate: O'Leary on Tithes, p. 65; that is the view taken by Law, C., in *Commissioners of Church Temporalities* v. *Grant* (2), at p. 452, and by Palles, C.B., at p. 466. Even if tithe composition was charged on the fee, which we do not admit, tithe rentcharge is not so charged. Section 2 makes it absolutely clear that so long as there is a responsible estate existing, as there is here, the lease assigned to Giffney not having been determined, the superior estate vested in the defendant Annesley cannot be made liable. If that lease had determined the defendant Annesley would, by the express provisions of section 9, only have been liable for one year's arrear of tithe rentcharge; as it is, the plaintiffs seek to make his estate liable for all the arrears. Section 27 enables proceedings to be taken for recovery of the charge, but a person cannot make default in payment if his liability has never arisen, which is the case here. The plaintiffs are trying to assert a charge *in rem*. It is doubtful whether the Court can order a sale of lands for arrears of tithe rentcharge, but at any rate it can only order a sale of the responsible estate, which here is worth nothing. *Saunderson* v. *Stoney* (3) and

(1) 10 A. C. 14. (2) 11 L. R. Ir. 430. (3) 2 Ir. Eq. R. 154.

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Madden v. *Wilson* (1) only decided that out of rents coming to the hands of a receiver he is bound to pay the tithe rentcharge in priority to rent due out of the estate primarily liable: *Commissioners of Church Temporalities* v. *Harrington* (2), *per* Chatterton, V.-C., at p. 135. This is a decision in point, as the point as to the motion being unsustainable in form was given up during the argument, and it was expressly decided that the tenant was entitled according to the provisions of Deasy's Act, which was put in force in the present case, to apply his rent in payment of head rent and not tithe rentcharge, and that decision was affirmed on appeal, but is not reported. Even if the fee is liable, all parties interested should be before the Court, but neither Lord Valentia nor Giffney are parties to this action.

Henry, K.C., in reply:—

The proviso in section 9 restricts the liability where there has been a surrender, but it does not apply here. It does not create a charge, it purports to cut down a charge already existing. Section 16 recognises that the liability to tithe rentcharge is thrown on the lands, and section 27 says "affecting the lands chargeable," which means the fee.

April 29.

THE MASTER OF THE ROLLS:—

This action is brought for the recovery of tithe rentcharge in lieu of rectorial tithes in respect of two denominations of land, Ballysax and Moortown, in the county of Kildare, and for a receiver or sale. The existence of the tithe rentcharges, and their amount, and the amount of arrears due, are common facts, and the title of the plaintiffs to receive them is clear. The question is, whether the defendants or their respective estates are liable.

The undisputed facts (which indeed have been proved, one of the defendants Charles Dudley Joynt Annesley being a minor) are that the defendant Annesley is under a settlement of 1846 tenant in tail in possession of both denominations, Ballysax being held in fee farm under Lord Valentia, and Moortown in fee simple.

(1) 6 Ir. Jur. (O. S.) 129. (2) 11 L. R. Ir. 127.

The other defendants are trustees of a term of 500 created by the same settlement for family purposes.

The lands are actually occupied by Mrs. Anne Daly as yearly tenant, and if there were nothing more the defendants and their estate would be clearly liable. It appears, however, that a lease for lives renewable for ever of both denominations was made by the defendant's predecessor in 1806 to one Critchley, and had prior to the accrual of the gales of tithe rentcharge in question become vested in John Howard Parnell, whose immediate tenant Anne Daly was. The rent payable by Mr. Parnell under his lease was £70 0*s.* 5*d.*, British currency. The rent payable by his tenant Anne Daly was £70 0*s.* 4*d.* Thus, assuming both rents to be paid, there was an annual loss to Mr. Parnell of one penny, besides which, as his estate was obviously equivalent to a perpetual interest under the statutes, he was liable also to the tithe rentcharge. Under these circumstances, it is not surprising to find that he was anxious to be relieved from this unpleasant position, and accordingly, by deed of the 12th March, 1896, he assigned his interest to one John Giffney, a pauper, who, of course, has never paid rent or tithe rentcharge. This sub-lease vested in Giffney could of course have been evicted for non-payment of rent and so determined; but if that had been done the defendant's estate would have become the next superior interest over the yearly tenancy, and so would have been undoubtedly liable to the tithe rentcharge. Instead, therefore, of evicting the interest, notice was served under Deasy's Act (23 & 24 Vict. c. 154, s. 20) on Anne Daly, the under-tenant, requiring her to pay her rent direct to the defendant, and this has been done. The effect of this is that each payment of Anne Daly's rent enures as a payment by Giffney, and so supports and confirms his interest. Giffney is therefore undoubtedly liable for the tithe rentcharge; but as he seems to have no resources beyond 6*s.* a week wages when in full employment, it is nothing but a liability so far as he is concerned. The plaintiffs, under these circumstances, claim against the defendants, and the question is, are they answerable?

This depends wholly upon the construction and effect of the Tithe Rentcharge Act, 1838 (1 & 2 Vict. c. 109), for since the decision of the House of Lords in *The Church Temporalities*

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Commissioners v. *Grant* (1), affirming the Court of Appeal (2), it cannot be questioned that the tithe rentcharge created by the statute is neither tithe nor composition, but a charge regulated by the Act and that alone. No doubt both Goulburn's Act and Stanley's Act are *in pari materiâ*, and where light can be obtained from them it may be used as aiding the interpretation of doubtful provisions. But the rights and remedies depend on the Act itself, when and as interpreted, and for present purposes it seems to me unnecessary to go beyond it.

The argument for the plaintiffs is shortly this. The Tithe Rentcharge Act charges the land with the rentcharge (section 7).

It provides that "every parcel of land . . . shall be and become severally liable to and charged with the payment of an annual sum," &c. "Provided . . . the lands comprised in each such estate or interest shall be charged," &c.

If then the lands are charged, the charge must be on each and every estate in the lands (save such as are expressly excepted) including the fee, and all the words in the 7th section must be read as indicating the person or persons liable to pay in the first instance, whilst leaving the land itself, in whosesoever hands it may be, charged.

For this proposition no authority was cited, though the cases of *Saunderson* v. *Stoney* (3) and *Madden* v. *Wilson* (4) were referred to as lending countenance to it.

Saunderson v. *Stoney* (3), decided in 1839, turned upon section 27 of the Act. It was not technically an *ex parte* application, because the Master of the Rolls (Sir Michael O'Loghlen) directed notice to be served, but really it was, because no one appeared to argue the point. It was a motion on behalf of the petitioner that the receiver should out of the rents received by him pay to the petitioner the sum due for tithe rentcharge up to and for the 1st of November, 1838. It appears that the receiver refused to pay the petitioner the sums due for tithe rentcharge and costs without an order of the Court, on the ground that as receiver he was bound to apply the sums received in the first instance in discharge of the

(1) 10 A. C. 14.
(2) 11 L. R. Ir. 430.
(3) 2 Ir. Eq. R. 153.
(4) 6 Ir. Jur. (O. S.) 129.

head rent. The petitioner and the receiver appeared by counsel, but the respondent did not appear.

Counsel for the petitioner submitted that the 27th section gives priority to the rentcharge over all other "charges," which must be understood as including the head rent; that although the rentcharge is payable by the person having the first estate of inheritance (within the meaning of the Act), it is, nevertheless, a charge upon the lands; and that the proviso in the 9th section would be unnecessary and insensible if the tithe rentcharge was not a charge to which the head rent itself was subject. The Master of the Rolls said that he thought that in the present case the receiver had nothing to do with payment of the head rent, but directed the case to stand over, that notice of the application might be served on the respondent. On a later day the Master of the Rolls made the order asked for. The respondent did not appear.

In *Madden* v. *Wilson* (1) the argument of counsel must be attended to, because the Master of the Rolls (Cusack Smith) referred to it in his judgment with approval. It followed *Saunderson* v. *Stoney* (2). Mr. Sullivan (afterwards Sir Edward Sullivan) moved that the receiver should out of the rents of the lands in his hands pay to the rector of the parish the arrears of tithe rentcharge. The lands were held under a lease for lives renewable for ever at a very heavy head rent, and the receiver had been in the habit of paying the head rent and the outgoings in disregard to the claim of the rector. These payments had exhausted all the profits of the lands, and it was now contended that the receiver should in future pay the tithe rentcharge in priority to the head rent. By the true construction of 1 & 2 Vict. c. 109 the tithe rentcharge was the first and paramount charge on the land, which by the 7th section was subjected to the rentcharge thereby created, the payment of which was merely regulated by the nature of the estates in the land therein specified, and the mention of the particular estates never occurred save in connexion with the liability or mode of payment, not as altering or taking from the specific charge on their subject-matter, namely, the land itself;

(1) 6 Ir. Jur. (O. S.) 129. (2) 2 Ir. Eq. R. 153.

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this appeared more clearly from the 9th section, and the proviso at the end thereof; that by the 27th section it was enacted that the rentcharge should have priority over all other charges, and that the rent was not expressly mentioned in the section, but the word "charge" should receive the same interpretation as was given to it by the 38th section of 4 Geo. 4, c. 99, where the word "charge" was followed by the words "whether for rent or taxes." In *Saunderson* v. *Stoney* (1) it was held that a receiver appointed under 1 & 2 Vict. c. 109, s. 30, was bound in the first instance to pay the rentcharge, and had nothing to do with the head rent. The principle of that case should rule the present application. No one else appeared except the receiver.

The Master of the Rolls concurred in the correctness of the argument founded on the analogy referred to. He thought that the provision in the 9th section, making the owner of the first estate of inheritance or other equivalent estate, liable in case of the forfeiture or other determination of any preceding estate or interest, showed the correctness of that view. Under the circumstances he would make the order in the terms of the notice.

If these cases were now binding authorities, the question decided by them could only be raised if a receiver were appointed over the interest of Giffney, and on an application to him to pay the tithe rentcharge out of Anne Daly's rent, without regard to the rent payable by Giffney to the present defendants; and Giffney is not even nominally a party to these proceedings. But no such proceeding could succeed when, as here, the owners of the superior interest have required the under-tenant to pay his rent to them directly under the Landlord and Tenant Act, 1860. This is matter of express decision. In *Commissioners of Church Temporalities* v. *Harrington* (2) the very point arose, although there was there the additional circumstance that the under-lease contained a proviso authorizing the tenant to pay his rent directly to the head landlord. The Vice-Chancellor there says, at p. 134:—"The plaintiffs in reply to this contend that the tithe rentcharge is in priority to rent payable by the owner of the perpetual estate liable to payment of rentcharge, and that, therefore, the tenant of such

(1) 2 Ir. Eq. R. 153. (2) 11 L. R. Ir 127.

owner has not the benefit either of the statute or of the proviso in his lease. They relied on the cases of *Saunderson* v. *Stoney* (1) before Sir Michael O'Loghlen, M.R., and *Madden* v. *Wilson* (2), before Mr. Smith, M.R., as establishing the priority of tithe rentcharge over rents, as well as other charges on the estate primarily liable. These cases decided that out of rents coming to the hands of a receiver he is bound to pay the tithe rentcharge in priority to rent due out of the estate primarily liable. But it is a different question whether the receiver can prevent the tenants from applying their rents, so far as may be necessary, to payment of head rent, and thus save their interests from eviction, or can require them to pay them over again, if they have already so applied them. If a receiver had not been appointed, the under-tenant would have had this right against his own landlord under the Act of 1860, or in the present case by express contract, and the owner of the tithe rentcharge could not possibly interfere, as he has no remedy whatever against any tenant who has an interest less than a perpetual interest as defined by the Tithe Rentcharge Act. The object of the Act was to exempt all such inferior tenants from direct liability to the owner of the tithe rentcharge. This exemption would be defeated if by indirect means such tenants could be compelled by the tithe owner to pay tithe rentcharge to him. The Act of 1860 made an important change in the rights of under-tenants since the decisions on the Tithe Rentcharge Act, relied on by the plaintiffs, were pronounced." (The Vice-Chancellor then states the effect of sections 20 and 21 of the Act of 1860). "These important rights are given without qualification or exception to head landlords and sub-tenants. The importance to the sub-tenant of the protection to his lands from distress or action for rent, unpaid by the default of his own landlord, is very great. When a receiver is appointed by this Court over the estate of a defendant, the correlative rights of landlord and tenant, as subsisting primarily between the defendant and his tenants, are not changed. The Court, by its officer, takes upon itself the possession previously existing in the defendant, and though it has additional powers of enforcing the landlord's rights,

(1) 2 Ir. Eq. R. 153. (2) 6 Ir. Jur. (O. S.) 129.

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as formerly by attachment, and still by sequestration, the rights to be enforced remain unaltered. There is a change only in the hand to receive the tenant's rent from that of the landlord to that of the Court by its receiver. I cannot hold that the appointment of a receiver, and the side bar order on the tenants to pay their rents to him, works so important a change in the rights so conferred on the tenant as to deprive him of the protection given him by the Act of 1860."

I think that reasoning is sound, and the conclusion justified. If so, the cases as to receivers have no application.

Stripped of this contention, the case turns upon the 7th and 9th sections of the Tithe Rentcharge Act.

It is quite true that these and other sections such as section 27 recognise that the land is charged. Of that there is no doubt. It is equally plain that land may mean the fee-simple, if that be or become the immediate superior interest over the yearly or other exempted tenancy. But a charge upon (say) a lease for lives renewable for ever is a charge upon lands. Many charges upon lands are secured solely by a term of years created for the purpose. That is the most common and recognised conveyancing mode of creating a charge. A charge is not a physical object, part of the land itself, as was suggested, if not argued; and, as I said, you cannot either fence it off or dig it up with a spade. It is a pecuniary burden imposed upon the land, payable out of the rents and profits or out of the proceeds of a sale, but it cannot subsist apart from some estate or interest in the land, be it great or small. In the Act it is, I think, clear that where the phrase "lands chargeable therewith" or the like occurs, the meaning is the same as "estate in the lands chargeable therewith."

Take section 7:—"Every parcel of land . . . shall be and become severally liable to and charged with the payment of an annual sum or rentcharge . . . and such rentcharges shall, except as hereinafter excepted, be payable by the party having in such lands respectively the first estate of inheritance or other estate or interest equivalent to a perpetual estate or interest, ... under which there shall be no such perpetual estate or interest, according to the quantity of such lands comprised in such estate or interest . . . Provided . . . that *the lands comprised in each such estate*

or interest shall be charged with the annual payment as aforesaid of one entire sum or rentcharge. . . . ."

Section 8 provides what shall be deemed a perpetual estate :— " Any estate or interest held under any deed containing any provision for the perpetual renewal thereof, and any estate or interest held for any term of years whereof at least one hundred shall be unexpired on the 30th of October in this present year . . . . shall be deemed and taken to be for all purposes relating to the said rentcharges equal to a perpetual estate or interest." It goes on to provide that a tenant in dower or by courtesy or having an estate for life under a settlement created out of any estate of inheritance, or out of any such equivalent estate as thereby defined, shall be, during his interest, liable to the payment of such charge, as fully as if he were entitled to the whole estate in such inheritance or perpetual interest."

In these sections it is clear that no provision is made for payment of the tithe rentcharge out of any estate or interest other than the one properly and specifically onerated therewith.

But sect. 9 seems to put the matter beyond doubt :—" A person entitled to hold and occupy under a lease the lands thereby demised free from tithe or composition shall not be liable to pay the tithe rentcharge, but the party having the first estate of inheritance or an equivalent estate shall be liable to such payment," implying very plainly that otherwise he would not be liable, and that the person having the next superior estate over him is not liable unless some similar event or state of facts exists in his case.

The section then goes on to provide for what is to happen if the estate first liable comes to an end :—" Provided always, that in case of the forfeiture, surrender, or other determination of any estate or interest the owner whereof may be liable to the payment of such rentcharge as aforesaid." On the happening of any of these events, " the party having the first estate of inheritance . . . in remainder or reversion shall *become liable* to the said payment" of the rentcharge. This implies that he was not *liable* all the time.

" Provided also that in the case of any such devolution of interest no more than the amount of one year's arrears of rentcharge

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shall be a charge on the lands subject to the payment of such annual rentcharge."

The plaintiffs need to read into this section another event not found there, namely, the event of the tithe rentcharge not being recoverable from the owner of a subsisting estate charged therewith, by reason of his poverty or his refusal to pay, an event not provided for. Had Giffney been evicted, then the defendants would have become liable, but only to one year's arrear. But he has not been evicted, and the action seeks to charge them with not one but nearly six years' arrears.

In my opinion the case is one not provided for by the statute, and I have no power to do what the plaintiffs ask.

It would have been convenient had the Act contained a provision that if there was difficulty in raising the tithe rentcharge out of the estate expressly onerated with it, recourse might be had to the next superior interest, and so on. But no such provision exists, and no such contention has been made (unless indeed it is to be found in the argument of counsel in *Madden* v. *Wilson* (1)), although the Act has been in force some sixty-five years. The action must be dismissed with costs.

Solicitor for the plaintiffs: *William Alexander.*
Solicitor for the defendants: *W. S. Cornwall.*

W. L.

(1) 6 Ir. Jur. (O. S.) 129.

IN THE MATTER OF THE COLERAINE RURAL DISTRICT COUNCIL; EX PARTE LYLE.

M. R.
1903.
May 9.

(1903. No. 378.)

Payment out of Court of small sum—Tenant for life—Undertaking to expend in permanent improvements—Lands Clauses Consolidation Act, 1845, *sections* 69–72—*Settled Land Act*, 1882, *sections* 21, 25, 32.

A sum of £76 16*s.* 4*d.*, lodged in Court as purchase-money of lands taken under the Labourers (Ireland) Acts, was ordered to be paid out to a tenant for life after advertisements, on his undertaking to expend it in permanent improvements as if it was capital money under the Settled Land Acts.

SUMMONS.

This was an application on behalf of the Reverend John Lyle for payment out of the sum of £76 16*s.* 4*d.*, or, in the alternative, for investment and payment of dividends to the applicant, and for the costs of the application. The applicant was under family settlement of June 7th, 1879, tenant for life of (amongst others) lands in the townlands of Drumadragh, Effrick North, Liswatty, Ballindreen Scotch, in the barony of the North East Liberties of Coleraine, and county of Londonderry, with remainder to his son Hugh Lyle for life, with remainders over. The settled lands were subject to family charges and annuities, but, after providing for all charges, there was a balance of about £1600 a year, to which the applicant was beneficially entitled. The Coleraine Rural District Council, within whose district the said lands were situate, as the rural sanitary authority of the district under the provisions of the Coleraine Rural District Labourers Order, 1901, made pursuant to the Labourers (Ireland) Acts, which incorporated the Lands Clauses Consolidation Act, 1845, took a small portion of the said lands for the purpose of erecting labourers' cottages thereon, and the arbitrator duly appointed by the Local Government Board certified that the purchase-money payable for the land so taken amounted to £76 16*s.* 4*d.*, which sum had

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In re COLERAINE R. D. COUNCIL *Ex parte* LYLE

been lodged in Court by the said Council. The said Hugh Lyle, the tenant for life in remainder, consented to the application.

Leech, for the applicant:—

In *Re Navan Rural District Council*; *Ex parte Fitzherbert* (1), the Vice-Chancellor ordered payment to a tenant for life of a sum of £30 lodged in Court under the same Acts, without any undertaking by him to lay out the sum in permanent improvements. The applicant is willing to give such undertaking if required. [He referred to the Lands Clauses Consolidation Act, 1848, sections 69–72, and to the Settled Land Act, 1882, sections 21, 25, 32.]

THE MASTER OF THE ROLLS made the following order:—

"THE Judge doth order that advertisements be published in the usual manner, such advertisements to state that the payment therein mentioned is to be made on the undertaking of the applicant to expend the sum to be paid in permanent improvements on the lands settled by the family settlement of June 7th, 1879, in the affidavit of the applicant mentioned, as if the same was capital money, under the Settled Land Act, 1882; and it is ordered that, upon production of the certificate of the proper officer of the due publication of advertisements, and of no caveat having been lodged pursuant thereto, the Accountant-General do make the payment in the schedule hereto mentioned, as therein directed; and the Judge doth order that the Coleraine Rural District Council do pay to the applicant his costs of the said application and this order and proceedings thereunder, together with all costs properly and necessarily payable, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845, and the several Acts incorporated therewith, when taxed and ascertained; and the Judge doth certify for counsel."

Solicitor for the applicant: *J. M. Davies.*
Solicitor for the District Council: *H. W. Leech.*

W. L.

(1) [1902] 1 I. R. 6.

IN THE MATTER OF THE COLERAINE RURAL DISTRICT COUNCIL; EX PARTE GIVEEN.

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(1903. No. 383.)

Payment out of Court of small sum—Tenant for life—Undertaking to expend in permanent improvements—Lands Clauses Consolidation Act, 1845, *sections* 69–72—*Settled Land Act*, 1882, *sections* 21, 25, 32.

A sum of £41 17*s.* 4*d.*, lodged in Court as purchase-money of lands taken under the Labourers (Ireland) Acts, was ordered to be paid out to a tenant for life without requiring advertisements, on his undertaking to expend it in making an avenue to the mansion-house on the settled lands.

SUMMONS.

This was an application on behalf of Robert Hugh Giveen for payment out of the sum of £41 17*s.* 4*d.*, the applicant undertaking to expend it in effecting permanent improvements on his estate, or, in the alternative, for investment and payment of dividends to the applicant, and for the costs of the application.

The applicant was tenant for life of (amongst other lands) the lands of Ballysally, in the county of Londonderry, which were held in fee-farm, with remainder to his first or other sons in tail male. His eldest son was a minor. The lands in question, with others, were subject to a jointure of £250 a year, and to mortgages and family charges amounting to £6633, the interest on which amounted to £326 a year. The gross rental of the estate was about £1300, and after payment of head rents, jointure, interest on incumbrances, and other outgoings, the applicant had an average yearly sum of £300 for his own use.

The Coleraine Rural District Council, within whose district the said lands of Ballysally were situate, as the rural sanitary authority of the district under the provisions of the Coleraine Rural District Labourers Order, 1901, made pursuant to the Labourers (Ireland) Acts, 1883 to 1896, which incorporated the Lands Clauses Consolidation Act, 1845, took a small portion of

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the said lands for the purpose of erecting labourers' cottages thereon, and the arbitrator duly appointed by the Local Government Board certified that the purchase-money for the land so taken amounted to £41 17*s.* 4*d.*, which sum had been lodged in Court by the said Council, Robert Hugh Giveen being only tenant for life.

Leech, in support of the application, referred to the order in *Re Coleraine Rural District Council*; *Ex parte Lyle*, p. 445, *ante*.

The Master of the Rolls required an affidavit to be made by the applicant of the nature of the permanent improvements on which he was prepared to lay out the money.

On May 18th an affidavit was filed by the applicant stating that there was no avenue or front entrance from the county road to the hall-door of the mansion-house on the property, but only a back way, and he undertook, if the money was paid out to him, to expend it in making an avenue or entrance-drive from the county road to his said house.

May 18. THE MASTER OF THE ROLLS thereupon made the following order :—

> "THE applicant, by his counsel, undertaking to apply the sum hereinafter mentioned in effecting permanent improvements on his estate, as in his affidavit filed on this day mentioned, it is ordered that the Accountant-General do pay to the said applicant the sum of £41 17*s.* 4*d.* in Court to the credit of this matter, as in the payment schedule hereto annexed; and it is ordered that the Coleraine District Council do pay to the said applicant the costs of this application and order, together with all costs properly and necessarily payable, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845, and the Acts incorporated therewith, when taxed and ascertained; and the Judge doth allow counsel."

Solicitor for the applicant: *J. M. Davies.*
Solicitor for the District Council: *H. W. Leech.*

W. L.

COONAN *v.* O'CONNOR.

M. R.
1903.
Jan. 28, 29, 31.
Feb. 11, 18.
Appeal.
June 19, 22.

Mortgage—Construction—Equitable assignment—Assignment of future crops—Valuable consideration—Irrevocable appointment of auctioneer to let and manage lands—Bill of sale.

M., who was possessed of a farm at B. in the county of Kildare, was in the habit of employing the defendants, who were auctioneers, to let the grazing and manage the land for her. The defendants sometimes paid in advance the rents and taxes, and when they let the meadows or sold the crops they received the money, and after deducting what was due, they paid the balance to M. M. had deposited with the defendants the title-deeds of the farm by way of equitable mortgage.

In November, 1900, M. applied to the plaintiff for advances to pay off the amount due to the defendants, and also some rent that was due, which the plaintiff agreed to make upon the security of the agreement hereinafter stated, and also upon getting up the title-deeds. On 29th December, 1900, M. signed an agreement, whereby, in consideration of the plaintiff paying for M. £200, she assigned to the plaintiff, as security therefor, the authority to let and manage her farm, for grazing, meadow, or other purpose, and out of the proceeds of said letting, to retain such sums to liquidate the above, or any other sum advanced to M., or paid by the plaintiff on her account; and M. appointed the plaintiff her auctioneer and salesman, to dispose of same at such time and place as he thought best, and to retain the sums advanced out of the proceeds, together with commission and expenses, and hand M. the balance. This agreement to be irrevocable.

The plaintiff paid off the defendants, and paid the rent due. The plaintiff, in January, 1901, advertised the meadows for grazing, but owing to the action of M. the attempt to let them proved abortive, and the grass was allowed to spring into meadow. On the 5th July the plaintiff advertised the meadows for sale, but they were not sold. M. subsequently employed the defendants to auction her meadows, and they were sold on the 16th July. On the 19th July the plaintiff's solicitor wrote to the defendants, informing them of the agreement of the 29th December, 1900, and cautioning them not to pay over the proceeds of the sale to M. Notwithstanding this, the defendants paid over the balance of the money to M., after deducting the expenses of the auction and commission:—

Held (by the Master of the Rolls), that the agreement of the 29th December, 1900, was an equitable mortgage of the land, and that it also conferred upon the plaintiff a specific interest in the crops on the farm, and in the purchase-

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money thereof when sold, and that the plaintiff was entitled to have the amount of his debt and interest declared well charged upon the farm and crops.

Held (by the Court of Appeal), that the defendant, having had notice of the agreement of the 29th December, 1900, before he paid the balance of the proceeds of the sale to M., was liable to the plaintiff for the amount of the balance.

Held, by Walker, L.J. (agreeing with the Master of the Rolls), that the agreement of the 29th December, 1900, conferred an equitable charge in favour of the plaintiff on the land and growing crops.

THE defendant Ellen Molony was possessed of a farm at Ballycorrigan in the county of Kildare, held under the Duke of Leinster, comprising about 60 acres, which she was in the habit of letting for grazing or meadowing by the season. The plaintiff, Edward Coonan, was an auctioneer at Kilcock in the same county, and the defendant O'Connor was also an auctioneer. O'Connor had done business for her for some years prior to the year 1900, and he had advanced her money to the extent of £120, for which he held as security the title-deeds of the farm. In November, 1900, she applied to the plaintiff for an advance, which he agreed to make on getting the securities which O'Connor held, together with an authority to let her farm until he was paid. On the 29th December, 1900, she signed the following agreement with Coonan :—

> "In consideration of your advancing me, or paying on my account, the sum of £200, receipt of which I hereby acknowledge, I hereby assign to you, as security therefor, the authority to let and manage my farm for grazing, meadow, or other purpose, and out of the proceeds of said letting, to retain such sum or sums to liquidate the above, or any other sum advanced to me, or paid by you on my account; and I appoint you my auctioneer and salesman, to dispose of same at such time and place you think best, and to retain any such sum as you have advanced me out of the proceeds thereof, together with your usual commission and expenses, and hand me the balance; and if any deficiency occurs, I agree to make good same before November 1st, 1901; and this agreement is irrevocable by me.
>
> "ELLEN MOLONY."

In pursuance of this agreement Coonan paid £125 to O'Connor, and he paid the rent due on the farm, and also the taxes, making a total advance to Miss Molony of over £200.

After the plaintiff got the security he advertised the farm for grazing, to be let on the 11th January, with the approval of Miss Molony; but on the 11th January Miss Molony stated she would not let any of the land unless she let it all, and so the lettings fell through. Between January and July the lands were allowed to run in meadow, instead of being grazed. The meadows were advertised by the plaintiff to be sold on the 5th July. Several bidders attended, but owing to the action of Miss Molony, who ordered them all off the farm, the sale proved abortive.

On the 8th July, 1901, the defendant O'Connor wrote to Miss Molony stating that he had an auction at Laraghbryan —a place in the county of Kildare near Miss Molony's lands— on the 16th July, and that as she had not sold her meadows she might like to try and sell them on that day. In a conversation with Coonan, Miss Molony showed him O'Connor's letter of the 8th July, and on the 11th July, 1901, Coonan wrote to O'Connor cautioning him against interfering in any way with the meadows on the land, or he would take proceedings to prevent him.

On receipt of this letter O'Connor wrote to Miss Molony on the 12th July, enclosing a copy of Coonan's letter, and asking Miss Molony if she had power to deal with her land, and at an interview between O'Connor and Miss Molony subsequently she stated that she had absolute control over her lands. On the 16th July Miss Molony gave O'Connor instructions in writing to let her meadows on foot to the best bidders, and the auction was held on the same day and realized £128 14*s.* 6*d.* On the 19th July the plaintiff's solicitors wrote to O'Connor stating that by an irrevocable appointment and agreement, dated 29th December, 1900, Miss Molony had charged her farm and farm produce in favour of the plaintiff for £261 5*s.*, and appointed him to manage, auction, and sell the grazing, meadowing, &c., and apply the proceeds to repay himself the amount of the advance. They required O'Connor to hand over the money realized, and cautioned him against paying the balance to Miss Molony out of the proceeds derived from the auction. The defendant O'Connor deducted the expenses of the auction, paid the outgoings on the lands, and paid the balance to Miss Molony.

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On the 24th July, 1901, Coonan brought an action against O'Connor and Miss Molony for an injunction to restrain them from letting or making grazing lettings of the land, or from interfering in the management of the farm, and for an injunction to restrain the defendant O'Connor (who traded as "Patrick O'Connor & Son") from paying the money realized to Miss Molony, and also for a declaration that the sum of £280 18*s.* 6*d.* might be declared well charged on the farm and on the rents and profits thereof, and that the amount might be raised by a sale, or by the appointment of a receiver.

Miss Molony did not defend the action. The defendant O'Connor filed a defence in which he denied the legal validity of the agreement of the 29th December, 1900. He further pleaded that the first intimation which he had of any claim of the plaintiff in respect of the lands was on the 20th July, 1901, when he received from the plaintiff's solicitors the letter of the 19th July, after the auction. He pleaded that Miss Molony stated to him that she had absolute control over her lands, and relying on that statement, and acting on her instructions, he held the auction, which was conducted *bona fide*, and in the ordinary course of business.

Blood, *K.C.*, and *H. C. Geoghegan*, for the plaintiff.

Campbell, *S.-G.*, *Matheson*, *K.C.*, and *D. J. O'Brien*, for the defendant O'Connor.

The arguments are reported *infra* on the hearing in the Court of Appeal.

THE MASTER OF THE ROLLS:—

In this case Edward Coonan is plaintiff, and the defendants are Patrick O'Connor & Son, and Ellen Molony. Ellen Molony has filed no defence, and the plaintiff is entitled to judgment against her. The real defendant in the case is O'Connor, and the plaintiff's claim against him is, in the first place, for an injunction (which is now out of the case on the evidence), and secondly, for an account "of all moneys received from any sale, auction, letting, or other dealing with the said farm or with the produce thereof since the 29th December, 1900." It (3) asks for payment [to the plaintiff of any moneys to which he may be

entitled under an agreement dated 29th December, 1900, and (4) an inquiry as to damages for breach of this agreement. It also asks that the sum of £280 18*s.* 6*d.* may be declared well charged on the farm of Ballycorrigan, and on the rents and profits thereof, and that the amount may be raised by sale of the premises, or by the appointment of a receiver, or both.

The facts appear to be these:—The defendant Ellen Molony was possessed of a farm of land at Ballycorrigan, county Kildare, and the defendant O'Connor was an auctioneer, and had managed or, as it was called, "financed" her farm, and he paid in advance rents, taxes, &c., and as auctioneer sold the crops and grazing, receiving the money and paying himself out of the proceeds. He had been advancing money to her, and she had made a mortgage to him of her interest in the farm, which she appears to have held as personal representative of her deceased brother. The plaintiff is also an auctioneer, and in or about November, 1900, Ellen Molony went to him at his house and told him she needed an advance in order to pay off the mortgage to O'Connor and also to pay the rent, and in consequence of her application an agreement was entered into between the plaintiff and herself, bearing date December 29, 1900, the effect of which is the chief matter in discussion between the parties. It amounted to an irrevocable appointment of plaintiff, as her auctioneer, to manage her farm for grazing, and out of the proceeds of the lettings to pay off the sum of £200, and to retain anything due to him for expenses, and to hand her the balance.

Having accepted this position, he paid the money on foot of the agreement and advertised the lands for grazing, and paid off O'Connor the amount due to him, £125 or thereabouts; and an auction was actually held, and a number of the divisions were knocked down to purchasers, but Miss Molony, who appears to be a lady more than usually capricious, attended at the sale and would not allow it to be completed. Of course, if Mr. Coonan had a valid authority under the letter of 29th December, he could have gone on in spite of her, but if he had insisted the result would no doubt have been disastrous under the circumstances. The result was, the grass was allowed to grow and it had to be sold as hay, and on the 5th July it was advertised by Mr. Coonan,

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when there was a large attendance of buyers, but Miss Molony again attended at the sale, and objected to what was going on, and acted in such a way that the sale proved abortive. She interfered and sent the purchasers away. On the same day she wrote to the plaintiff asking him to sell it privately. He replied, saying satisfactory prices would have been obtained but for the way she went on. [His Lordship referred to the letters of 5th and 6th July, 1901.] She replied on the 8th; she asked him what he meant to do, and asked him if he would advertise it again. The season was then advanced, and the plaintiff arranged with one Ryan to save the hay with her approval. Afterwards she employed O'Connor to auction the hay, which was done on the 16th of July without any advertisements, O'Connor receiving the proceeds for her. Against her, of course, there must be judgment by default.

As to O'Connor—his debt of £125, or £130, was paid by Miss Molony out of the plaintiff's advance, and (at least as to £100) by her endorsement of plaintiff's cheque. He had himself had an actual mortgage for his account, and knew that Coonan was requiring security, even if he had not actually got it. He did not interfere until after the abortive sale of the 5th of July. He then approached the defendant Molony by letter of 8th July, offering to sell the meadows for her. He wrote as follows:—"I have an auction at Laraghbryan on the 16th of July. I believe you did not set your meadows. Perhaps you would like to try them on that day." She wrote on the 10th, saying, "Your kind note received, and I feel so grateful for your kind thought in letting me know of your auction at Laraghbryan on Thursday, the 16th instant. There is nothing as good as my meadows around. The auction held here on Friday last did not go on. I know not the reason. I have not heard has he done anything of a private sale since. As soon as I know I shall let you have a line at once, as it is time they should be let." She appears to have seen Coonan and to have informed him of O'Connor's letter, because Coonan, on the 11th of July, wrote to O'Connor, as follows:—"Dear sirs, Miss Molony of Ballycurraghan has handed me your letter of the 8th inst., and I must now caution you against interfering in any way with the meadows on her land, or I will be obliged to take such proceedings as may be necessary to prevent your doing so."

At one stage of the case this letter of July 11th was relied on as actual notice of the express agreement of the previous December, but I did not think it was, and I do not think so now. It was a letter written by a person claiming some right to interfere in the matter, but I cannot hold that it amounted to constructive notice of the previous agreement with the plaintiff, although it is likely that O'Connor knew plaintiff had some additional rights in the matter besides that of a mere auctioneer. O'Connor himself had a mortgage of the lands, and from that I infer that he knew that Miss Molony was in the circumstances unable to give sufficient security of a personal character. I do not, however, think that up till that time the defendants had actual notice of the agreement with the plaintiff.

O'Connor then having got that letter, wrote to Miss Molony what was rather a strong letter to a lady in her position. It is this: —"Mr. Coonan has sent me a letter dated yesterday, copy of which I enclose. I understood when you were speaking to me that you had full power to manage your farm as you thought fit. It seems from his letter that you have not. We merely write to call your attention to the fact, and if you mean to give us instructions to be perfectly certain that you have power to do so." Then followed the letter of the 16th, under which O'Connor obtained from Miss Molony a written authority to sell. The sale was held on the 16th. On the 19th she wrote to the plaintiff, and on the same date plaintiff's solicitors wrote to O'Connor a letter, which was clearly notice of the agreement of 29th December, 1900. The question, then, is—what is plaintiff's position and what his rights under the agreement of December, 1900.

The case of *Holroyd* v. *Marshall* (1) was relied on by the plaintiff. In that case there was an assignment of machinery in existence, and of machinery which might in future be on the premises. It was admitted that there was a valid equitable assignment of existing machinery, but it was contended that there was not a valid assignment of property which was not then in existence, and the case settled this matter once for all, deciding that the assignment was in both instances valid, although the limitation sought to be put on it, namely, that an effectual assignment

(1) 10 H. L. Cas. 191.

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of the kind in equity must be such an agreement as an action for specific performance would lie for, which is no longer law.

There are two principal questions which arise in reference to the construction of the document—(1) What is the subject-matter, and is that subject-matter capable of equitable transfer? (2) If so, is the language used such as to operate as an equitable transfer of it?

In *Bennett* v. *Cooper* (1) a deed poll appointing a person an attorney to receive all moneys coming to the appointor as legacies or bequests was held to amount to an equitable assignment of all legacies, &c., to which the person should become entitled. Lord Langdale says:—"Now the deed poll is admitted to have been executed for valuable consideration, and it seems to me to amount to an assignment of, or a covenant or agreement to assign, the sums which the plaintiff was empowered to receive, but it was, as to the principal debt, only a collateral security in aid of the trust to sell the estate, which was to be sold under the trust. It was intended to secure the debt, and ought, as it appears to me, to be considered operative so long as the debt existed, and having regard to the circumstances attending the debt, the covenant, the mortgage of the term, and ultimately the trust to sell, I think the debt and the personal remedy to recover it did subsist at the time this bill was filed, and also, that the deed poll was then operative."

In *Clements* v. *Matthews* (2) there was an assignment by one Baggs to plaintiff of (*inter alia*) "growing and other crops which at any time thereafter should be in or about" the High House Farm, which was held by Baggs as tenant from year to year of the defendant. The farm was surrendered by Baggs to defendant, who had distrained, while the crops were still growing. Defendant had notice of plaintiff's claim. It was held that the plaintiff had a valid security on the growing crops as against the defendant, who had notice of his claim when he accepted the surrender; but that as the value of the crops was not greater than the defendant's claim for rent with the cost of saving the crop, the plaintiff had not sustained damage, and could not succeed.

(1) 9 Beav. 252. (2) 11 Q. B. D. 808.

Brett, M.R. (p. 812), says:—"The bill of sale, however, in my opinion, relates to two different sets of future crops—one of crops as should thereafter be upon this High House Farm, and the other of crops which might thereafter be anywhere. With regard to the last, I think it too indefinite, but this cannot affect the description of the future crops on this farm, which appears to me to be sufficiently distinct and definite to identify the property meant to pass, and which, therefore, in equity did pass, between the parties to this bill of sale. Consequently, I am of opinion that this objection cannot succeed"; and Cotton, L.J. (p. 814), says:—"An objection to this bill of sale has been taken on behalf of the defendant with respect to the future crops, and it has been contended that it was not effectual as against Baggs, because, as appears from the judgment of the House of Lords in *Holroyd* v. *Marshall* (1), in order to be so effectual in equity, the property which is not existence at the time of the execution of the deed must be sufficiently specified, and that that was not done here, because the bill of sale describes such future crops as those on this farm and elsewhere, and this it was said was too vague and general. In my opinion it is not, and I agree with the Master of the Rolls that this is really an assignment of the future crops on this farm, and also distributively of any other future crops which Baggs may be entitled to"; and Bowen, L.J. (p. 817), says:—"Now the first point taken by the defendant with regard to the bill of sale is an extremely technical one—it is that the description of the crops is too vague, and that neither in law nor equity does the bill of sale confer on the plaintiff a right to growing crops anywhere, because the words are that he is to have the crops on the farm which Baggs then had, or upon any other farm which should come into his possession. Now at law the bill of sale would pass no property in crops not in existence, but at most it would give a right to enter and take them should they come into existence, but in equity it would confer a right on the grantee to the property when it should come on the farm. Now is a bill of sale too vague because it says that the grantee shall have all the future property of the grantor on Blackacre, and on

(1) 10 H. L. Cas. 191; 33 L. J. Ch. 193.

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all other premises which may happen to be his hereafter? I think it amply sufficient to cover the crops on Blackacre at all events; but even if it were to amount merely to a contract to allow the bill of sale holder to take possession of all future crops as should come into possession of the farmer, I confess I am not at present prepared to say that would be too vague."

Coombe v. *Carter* (1) was the case of an assignment of all moneys of or to which the mortgagor might at any time during the security become entitled to under any settlement, will, or other document, and all other real and personal property "of, in, or to which he was, or during that security should become, beneficially entitled or interested, for any vested, contingent, or possible estate or interest"; and this was held valid as regards property accruing by will.

In *Tailby* v. *The Official Receiver* (2) it was decided that an assignment of future book debts, whether in the business the assignor then carried on, or in any business which he might at any time carry on, is not void for vagueness, or on any other ground. This case disposes of the limitation supposed to have been attached to the general principle by Lord Westbury in *Holroyd* v. *Marshall* (3) as confining it to cases where specific performance would have been decreed.

It is also further clear that the mere vagueness or generality of an equitable assignment of choses in action, which as choses in action did not exist at the time, will not prevent its operation. *Belding* v. *Reid* (4) and *Re D'Epineuil* (5) are overruled on this point, even if *Re D'Epineuil* (5) was rightly decided on other grounds. The latter case decided that the equitable agreement was void as being too vague, and was overruled on this point, though the decision may be supported on the ground that the agreement was void as being against public policy because it would deprive the party of the means of livelihood.

But the defendant's original contention was that, admitting all this where there is an assignment in equity of choses in action, present or future, the instrument in this case is not an assignment

(1) 36 Ch. D. 348.
(2) 13 App. Cas. 523.
(3) 10 H. L. Cas. 191.
(4) 3 H. & C. 955.
(5) 20 Ch. D. 758.

of anything; but is merely an appointment, irrevocable no doubt, of an agent: conferring no interest by way of mortgage or charge or otherwise. This is the view of the document relied on in the defence. The word "assign" occurs in it, but not in reference to property, only in regard to employment; so that, if the defendant were right, the remedy would be by action against Miss Molony, presumably insolvent, and that alone.

In words this may be so. But, having regard to the circumstances, it seems to me that this is far too narrow a view. Mr. Matheson's argument, following that of the Solicitor-General, led to conclusions revolting to all ideas of justice. The plaintiff advanced his money on the faith of his having a definite security for its repayment, by his being placed in a position to recoup himself out of the crop on the lands. His appointment as agent and also as auctioneer could not be recalled till he was paid off. The defendant O'Connor had full notice of these terms before he received one penny of the proceeds of the crops, and before he paid over one penny to his co-defendant; and at the time he had in his own pocket some £125 of the plaintiff's money, advanced, as he knew, on the faith of this security, which he, the defendant, actively, and on his own initiative, helped to frustrate.

If the law authorize him to do this, it is nothing short of an opprobrium. But still the question remained, is this the law?

I was sure there were decisions on the construction of irregular or informal instruments such as the present, though during the argument I could not, any more than could counsel, lay my hands on them. Immediately on looking into the matter I found that such decisions exist, and that they inevitably lead to a conclusion favourable to the plaintiff. I mentioned to counsel the case of *Abbott* v. *Stratten* (1), *Re Parkinson's Estate* (2), and *Barnes* v. *Moore*, only decided a few days since, and shortly reported in the *Times*.

Abbott v. *Stratten* (1) is a case which used to be frequently cited on another branch of law; but its bearing on the present question was not perceived. In that case Alice Stratten by deeds granted two annuities to Joseph Abbott charged upon her life

(1) 3 Jo. & Lat. 603. (2) 10 Ir. Jur. (N. S.) 82.

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estate in certain lands, and afterwards she applied to William Knox to lend her £500, which he agreed to do upon being secured the repayment thereof, and for that purpose she executed to him a power of attorney appointing him her true and lawful attorney to sue and so forth for all rent and arrears of rent due and to become due from the tenants and occupiers of the lands of Courtduffe and Blanchardstown, and to distrain for such rents and to give receipts in her name or his own, and to do all necessary acts for recovering or receiving the rents as if she were present and did the same, she thereby ratifying and confirming whatever he should do in the premises. There was a collateral memorandum to this power of attorney which provided:—"Inasmuch as the annexed power of attorney is given as a remuneration to Mr. Knox for the accommodation he has afforded me in the loan of £500, now lent on my bond, as well as for the repayment thereof, I hereby promise not to withdraw the same," &c.; and it was agreed that Mr. Knox should retain the amount of premiums on a policy of assurance on Mrs. Stratten's life and the interest on the £500 out of the rents, and that the principal money should be paid by certain instalments.

The Lord Chancellor says:—"I postponed the consideration of the question before me yesterday, not from any difficulty arising in my own mind, but because of the doubt recently thrown upon the law." He states what the questions to be decided were, and says—"Upon the whole of this document, and independently of the question of its being a power of attorney, I do not doubt that this is a clear agreement to secure the money on the land, and therefore it is, I think, an equitable mortgage." He then discusses *Mitchell* v. *Eades* (1) and some other cases on the subject, and decides that the instrument in question amounted to an equitable mortgage. *Abbott* v. *Stratten* (2) was followed in *Re Parkinson's Estate* (3), where William Robert Parkinson, being indebted in the sum of £448 to the petitioner, and in order to secure repayment in the matter executed a power of attorney whereby he authorized the petitioner to sell, let, or mortgage certain premises, and declared the power of attorney to be irrevocable until the petitioner should

(1) 2 Vern. 391. (2) 3 Jo. & Lat. 603. (3) 10 Ir. Jur. (N. S.) 82.

have received the whole of his account against him, or payment of any bills or promissory notes or bills of exchange for which he (Parkinson) was then or should become liable to or on behalf of the petitioner. Judge Dobbs declined to treat the power of attorney as an equitable mortgage, and refused to make any rule on the petition. An appeal was taken which was argued by the late Mr. Woodlock on the authority of *Abbott* v. *Stratten* (1). A curious circumstance occurred. The Solicitor-General (Mr. Lawson) and Mr. Kernan, Q.C., and Mr. Vereker, were instructed to appear in support of the decree of the learned Judge, and they stated that, having considered the case of *Abbott* v. *Stratten* (1) and the cases cited on the other side, they refused to argue the question; the Solicitor-General saying "he would not consume the public time in arguing in support of a decision which could not stand." The Lord Chancellor said that the decision of the Court below must be reversed. "This was a power of attorney for valuable consideration, and it is therefore irrevocable so long as the moneys advanced by Few (the petitioner) are unpaid. This is undoubtedly an equitable mortgage; no question about it."

Barnes v. *Moore* is reported briefly, but is a decision in the same direction. The *Times*, 5th February, 1903, contains the following report:—This was an appeal from the judgment of Mr. Justice Phillimore on the trial of an interpleader issue, reported in the *Times* of March 20, 1902. The defendant Moore was the judgment creditor of a Mr. M'Carthy for £143 on a judgment obtained on November 22, 1900. M'Carthy was the judgment creditor of the *Evening News* (Limited) for £1,000 on a judgment obtained on April 24, 1901. On April 26, 1901, Moore obtained a garnishee order *nisi* against the *Evening News* (Limited) to satisfy his judgment for £143. The plaintiff Barnes claimed to be entitled to the £143 by virtue of a charge which he alleged had been given to him by M'Carthy on the money which he (M'Carthy) might become entitled to recover from the *Evening News* in an action of libel which he brought against them. The question between the parties depended on the true meaning of a letter dated April 13, 1901, from M'Carthy to Barnes, which

(1) 3 Jo. & Lat. 603.

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constituted the charge. The material words were as follows:—"This will be your authority or that of your solicitors, or my authority to Messrs. Keen, Rogers & Company—M'Carthy's own solicitors—to pay to you or your solicitors, out of whatever money they may receive for my case against the *Evening News*, all moneys I owe you. You to have first claim to any money I may become entitled to from the *Evening News*." At the trial Mr. Justice Phillimore was of opinion that the charge only covered such money from the *Evening News* as reached M'Carthy or his solicitors, and that it would not be improper for the *Evening News* to pay the holder of the garnishee order. He accordingly gave judgment for the defendant. The plaintiff appealed. The Court allowed the appeal. Lord Justice Vaughan Williams said he thought that Mr. Justice Phillimore had taken too narrow a view of the document in question. That learned Judge considered that it was limited in its effect to such moneys as actually came into the hands of M'Carthy's solicitors. He (the Lord Justice) was of opinion that it extended to all moneys to which M'Carthy should become entitled from the *Evening News*. He therefore thought that the appeal should be allowed. Lord Justice Stirling and Lord Justice Mathew delivered judgment to the same effect. I may add that *Bennett* v. *Cooper* (1) comes in its facts very near to being an illustration of the same principle.

Bearing in mind that the defendant's whole argument in this case had been that there is no mortgage and no charge upon anything, I gave them an opportunity, if they desired it, of being heard on these cases, and Mr. Matheson, recognizing that if *Abbott* v. *Stratten* (2) is law the agreement between Coonan and Miss Molony is at the least an equitable mortgage of the land, therefore abandoned the case previously made, and contended that because it was an equitable mortgage, passing no property at law, it was inoperative to enable the plaintiff to acquire any interest in the rents and profits and the produce of the sales of the crops before taking possession; since an equitable mortgage of lands, by deposit of title-deeds for instance, does not confer a specific interest in the rents, crops, or other usufruct of the lands. So, if

(1) 9 Beav. 252. (2) 3 Jo. & Lat. 603.

this is an equitable mortgage, nothing passed by it save a right to have a sale of the land, or a receiver.

But in my opinion it is abundantly clear that the agreement in question is not only an equitable mortgage of the land but something more; and was intended, and is effectual, to confer a specific interest in the crops as well, and in their purchase-money of it when sold. The words are clear and all point to this:—[His Lordship read the agreement, *ante*, p. 450].

The "security" is "the authority to let and manage my farm" (not "the farm" itself) "for grazing, meadow, or other purpose; and out of the proceeds to retain such sum or sums to liquidate the above or any other sum advanced to me or paid by you on my account," &c. The money advanced by the plaintiff was contributed in advance out of the proceeds.

Inasmuch as the farm was to the knowledge of all parties habitually managed by Miss Molony by means of sales of the crop and grazing, such sales and lettings being made by auction, I think it is plain that the agreement pledged, so far as she could pledge it, the proceeds of the crops and lettings to the plaintiff by an irrevocable instrument, whereby he, and he alone, became her agent, with full powers to realize at his discretion and repay himself, holding the balance, if any, for her. In a mere equitable mortgage, and nothing more, the parties to it know that the mortgagor retains all his rights of dealing with rents and profits or selling produce, &c., till displaced. But here, no one can doubt that the document was framed in order to confer upon Coonan a right not involved in a mere equitable mortgage—that is, an actual assignment of all moneys to become due by purchasers of hay or tenants of grazing. It might indeed be contended that this would be the effect as regards crops, &c., if the instrument had contained a proviso that nothing in it should be held to amount to a mortgage of the land.

It is equally plain that this is a sort of interest which may be assigned in equity. If any legacies a man may at any time become entitled to from anybody, or any book debts he may own at any time, in any business whatever, or any crops which may at any time grow upon any lands of his in any place, may be the subject of equitable assignment, the money

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to be produced by the sale of crops may be similarly dealt with, and the only question is whether they were in fact assigned. No doubt the word "assign" where it occurs in the assignment is used grammatically in reference to the "authority" to let, &c., and not as applying to the crops. But no form of words is indispensable where the sense appears; and *Abbott* v. *Stratten* (1) shows that an irrevocable power of attorney, without any words of assignment or grant, may be sufficient to create a charge even upon the land itself. There is nothing in the point urged that the agreement only pledges whatever is received under it by the plaintiff himself. Miss Molony could not lawfully intercept any of the purchase-money to the prejudice of the plaintiff's rights; and if she obtained any of it she would be a trustee for the plaintiff to the extent of the interest she had irrevocably conferred upon him for value. Any agent appointed by her with notice of the previous assignment is bound to effectuate it, and cannot be in this Court in a better position than herself.

It would be a very lamentable state of the law if the defendant could escape his liability in this case to pay over to the plaintiff what he knew and had notice was his money, himself having received out of it the payment of his own claim against his co-defendant. Indeed he almost admitted this.

I am therefore of opinion that the plaintiff is entitled to succeed against the defendant O'Connor; and that there must be an account of what is due to the plaintiff, with interest at 5 per cent., and also of all sums received by the said defendant after notice of his charge. In taking the account, however, the defendant may be allowed credit for anything paid by him for rents, taxes, and rates, because these would have had to be paid by the plaintiff under his mortgage in any event. It is stated that rent was paid to the landlord, not by defendant O'Connor personally, but by Miss Molony out of money given to her by O'Connor for that purpose. If that be so, any such payment will be a credit as if it had been made by O'Connor directly.

R. W. L.

(1) 3 Jo. & Lat. 603.

The defendant O'Connor appealed (1).

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June 19, 20.

Matheson, K.C., O'Brien, K.C., and *D. J. O'Brien*, for the appellant:—

The agreement of the 29th December, 1900, is not an assignment of property: it is merely an appointment of a man as an auctioneer, and it confers no interest in the land, by way of charge or mortgage. It does not charge the lands, and in the month of December the grass, or crops, had not grown, so that it would be impossible to charge them. To make a valid charge of future property, there must be a specific charge on some species of property specifically described: *Tailby* v. *Official Receiver* (2). We contend that it is a mere licence to sell, and not being by deed is revocable: *Kerrison* v. *Smith* (3). If the plaintiff suffered loss by the revocation, he could sue for damages.

If the document amounts to a charge, it is a bill of sale, and is void, because it was not registered. An authority, or mere licence, to sell future crops would be within the Bills of Sale Acts.

Blood, K.C., and *H. C. Geoghegan*, for the respondent:—

The agreement of the 29th December, 1903, gave the plaintiff a charge on the land. A power of attorney to receive the rents of land, coupled with an agreement not to revoke it, if given for valuable consideration, is an equitable assignment: *Abbott* v. *Stratten* (4); *Bennett* v. *Cooper* (5), a case as to legacies. Such a document is a charge on land, which may be the subject of a petition for sale: *Parkinson's Estate* (6).

If the agreement is not a charge on the land, then it is an assignment of future choses in action, which is a valid assignment: *Holroyd* v. *Marshall* (7); *Ranken* v. *Alfaro* (8); *Tailby* v. *Official Receiver* (2). The debts which would arise from the sale of the grass, if it grows, is a future chose in action, and if there is a

(1) In the Court of Appeal, before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.
(2) 13 App. Cas. 523.
(3) [1897] 2 Q. B. 445.
(4) 3 J. & L. 603.
(5) 9 Beav. 252.
(6) 10 Ir. Jur. 82.
(7) 10 H. L. Cas. 191.
(8) 5 Ch. D. 786.

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valid assignment of a debt of which the debtor has notice, and he pays the subsequent instalment to the creditor, the assignee can recover from him: *Brice* v. *Bannister* (1). A contract for the sale of grass must be in writing to satisfy sect. 4 of the Statute of Frauds, and in this respect grass is the same as land. There is a distinction between *fructus naturales* and *fructus industriales*; thus a contract for the sale of a crop of potatoes is not a contract for the sale of land within the Statute of Frauds: *Evans* v. *Roberts* (2); nor a contract for the sale of growing timber: *Marshall* v. *Green* (3). A valid assignment in equity may be made of future crops: *Clements* v. *Matthews* (4). A mortgage of after-acquired property is valid, unless it is void for uncertainty: *Coombe* v. *Carter* (5); or a mortgage of one particular sort of future property, such as book debts: *Tailby* v. *Official Receiver* (6).

This document is not a bill of sale; it is not in the form required by the Bills of Sales Act, nor does it purport to be a bill of sale. Moreover, the Bills of Sale Act is not pleaded, and if a party intends to rely on the Bills of Sale Act he must plead it: *Coburn* v. *Collins* (7).

June 22.

LORD ASHBOURNE, C.:—

This is a very interesting case, not only for the question of law involved, but also from the illustration it affords of the folly of not letting sleeping dogs lie. The plaintiff brought this action, and after the lapse of six months from the last step taken the defendants served notice to dismiss for want of prosecution, and the plaintiff then undertook to proceed with the action. It was fully heard by the Master of the Rolls, who gave a careful and considered judgment in favor of the plaintiff.

The case is not a very unusual one to anyone acquainted with country affairs in Ireland. Miss Molony, a lady possessed of a grass farm in the county of Kildare, had recourse to auctioneers in the neighbourhood, partly for the purpose of obtaining advances,

(1) 3 Q. B. D. 569.
(2) 5 B. & C. 829.
(3) 1 C. P. D. 35.
(4) 11 Q. B. D. 808.
(5) 36 Ch. D. 348.
(6) 13 App. Cas. 523.
(7) 35 W. R. 610.

and also for the purpose of letting the grazing or meadows, and then when they received the money for the grazing or meadows, they were to repay themselves the amount of the advance, and pay her the balance. At one time the defendants, O'Connor & Son, were employed, and—to use a common phrase—they *ran* her for a time; she thought she would change her hand, and she applied to the plaintiff Coonan, who carried on business as an auctioneer at Kilcock. He was required to make an advance to enable her to clear up with O'Connor the amount which she owed, to the extent of £120. The plaintiff being asked to see the matter through, said, "Well, I shall do so, but you must give me a letter to square me," and accordingly this document was drawn up, and signed. It is not expressed in lawyer's language, but it is perfectly capable of receiving a legal construction. I do not read this agreement, inasmuch as it has been read several times already, but anyone reading this agreement—without going into *minutiæ*—would see that it is a document given to the auctioneer to save him and to secure that the £200 advanced to the lady would be repaid. Its plain and only meaning is—"I appoint you irrevocably my auctioneer of the grazing and meadowing of my farm, and out of the proceeds you are to repay yourself, and hand me the balance." If Miss Molony tried, the day after it was signed, to act in derogation of it, or to interfere with the plaintiff with respect to the farm, a Court of Equity would restrain her at once. A bargain is a bargain, and when Miss Molony got the money from the plaintiff on the faith of this agreement she cannot go back on it.

Can anyone else claiming through her do so? That is O'Connor's position. Miss Molony gave him authority to sell the meadows by auction. O'Connor cannot say—"I know nothing about it"—he had notice up to the hilt, and he was, therefore, bound not to do anything that would amount to a fraud against Coonan. How did he act? I am sure he did not intend to do anything wrong. He sold the meadows for £138, and after deducting the expenses he handed the balance to Miss Molony, which ought to have gone to Coonan. He must, of course, account to Coonan for the balance of this money.

Mr. Matheson argued the case with his usual skill, and he took

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us through all the legal terms applicable to the case. He first endeavoured to show that this document was a bill of sale, and had he succeeded in doing so, that might have enabled him to defeat the plaintiff. In my opinion it is not a bill of sale, and it was never treated by the parties as such. Moreover, the statement of defence shows that the defendant at the date of the pleading did not consider it a bill of sale, because the non-registration is not pleaded.

Then Mr. Matheson took up the judgment of the Master of the Rolls, and contended that this agreement did not amount to an equitable assignment or an equitable mortgage. Be it so—for the purpose of the argument; but where does he meet the broad view of the case put by the Master of the Rolls in his judgment? "The plaintiff advanced his money on the faith of his having a definite security for its repayment, by means of his being placed in a position to recoup himself out of the crop on the lands. His appointment as agent and also auctioneer could not be recalled till he was paid off. The defendant O'Connor had full notice of its terms before he received one penny of the proceeds of those crops, and before he paid over one penny to his co-defendant; and at the time, he had in his own pocket some £125 of the plaintiff's money, advanced, as he knew, on the faith of this security, which he, the defendant, actively, and on his own initiative, helped to frustrate."

Miss Molony allowed the case to go by default, and Mr. C'Connor claiming through her, and with full notice and knowledge of the plaintiff's rights, cannot be allowed to act in violation of those rights. I am, therefore, of opinion that the conclusion arrived at by the Master of the Rolls in favour of the plaintiff is right, and should be affirmed, and the appeal should be dismissed with costs.

FITZ GIBBON, L.J. :—

The ground upon which we hold Mr. O'Connor liable is simple, and we can simplify the procedure adopted by the Master of the Rolls, and do final justice between the parties before us, if they agree. The Master of the Rolls granted an injunction against both defendants, against doing any act in breach

of the agreement between the plaintiff and Miss Molony, and he made Miss Molony answerable for the amount due on account No. 1, and O'Connor & Son answerable on account No. 2. In my opinion the agreement is not an assignment of anything—at law or in equity. It does not purport to assign anything corporeal. It is, in terms, an "assignment" of *authority* to let and manage the farm. This authority is limited and defined, and powers are superadded. The letting must be for grazing, meadow, or other (which I read as other *like*) purpose, "and out of the proceeds of said letting to retain such sum or sums to liquidate the above or any other sum advanced to me or paid by you on my account, and I appoint you my auctioneer and salesman to dispose of same at such time and place as you think best, and to retain any such sum as you have advanced me out of the proceeds thereof, together with your usual commission and expenses, and hand me the balance."

Reading all these clauses together, I hold the document to be an appointment of an auctioneer and salesman, and an authority to him to act as such, and to dispose of the money coming to his hands to reimburse himself. It is irrevocable, because it is a power given in consideration of money advanced.

It is not a bill of sale for two reasons at least, and probably more—1. It is only a licence to deal with the farm as an auctioneer and salesman or manager, and it does not transfer or deal with *possession*; 2. There are no chattels in the case. It licensed the plaintiff from the 29th December, 1900, to do certain acts with regard to the farm. If he had let it for grazing, there never would have been any chattel crop there at all. Could the plaintiff, on the day after the agreement was made, have bought cattle or sheep, stocked the land with them, and farmed the place himself? In my opinion he could not. He was to get, not the *profits* of land in his possession, but the *proceeds* of letting and management by him as auctioneer, salesman, and manager. The whole scope of the agreement was to employ the plaintiff to make money out of property which was to remain in the legal possession of his employer. The auctioneer had neither possession nor ownership; he was neither assignee nor mortgagee.

What are the rights of the plaintiff against O'Connor & Son?

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He would have had none, though Miss Molony had broken her contract with him, but for the fact that O'Connor & Son had notice of the agreement. Even if O'Connor & Son had innocently sold on the 16th July, they were served with full and formal notice before they received any money, namely, on the 20th July, and therefore they were bound in equity by knowledge that the proceeds of the sale were pledged to the plaintiff, before they parted with them. They would have been liable to an injunction against parting with the money, and would have been properly made co-defendants with their principal, as in the case of a stake-holder, or of a contractor engaged to do works which a plaintiff is entitled to restrain.

It seems to me that the rights of the parties can be ascertained without reference to the Bills of Sale Act, and without recourse to the doctrine of equitable assignment or charge, of which *Tailby's Case* (1) is an instance. There was a contract here which it was contrary to equity to allow Miss Molony to break; O'Connor & Son received the money, with notice of the plaintiff's right to receive and pay himself out of it, and they are liable to account with the plaintiff for it. The plaintiff is satisfied to take the proceeds of the sale as the value of the property sold. The sum received was £128 14*s.* 6*d.* and no more, and out of that two sums of £68 and £7 4*s.* 6*d.* were expended by O'Connor & Son in payment of rent and rates, and auction fees; accordingly they are entitled against the £128 14*s.* 6*d.* to credit for £75 4*s.* 6*d.*, and they are accountable, on their own showing, for £53 10*s.*

I do not think that they are chargeable with interest on that sum, for interest would not run against an auctioneer who got the money, though there were promissory notes of the buyers for the debt, and the basis of my judgment is that there was no transfer of the debt, no assignment, and no equitable charge, in the plaintiff's favour, but only an equitable right to the money. In my opinion £53 10*s.*, and no more, is the extent of the defendants' liability, on their own showing, and as it is certain that proceedings in Chambers could not materially, if at all, increase that sum, I suggest that the plaintiff should waive the inquiry, take the £53 10*s.*, in lieu of account No. 2, and credit it as part payment of the debt due by Miss Molony to the plaintiff.

(1) 13 App. Cas. 523.

WALKER, L.J.:—

I concur with the other members of the Court that this appeal should be dismissed, and the justice of the case will be met by a dismissal on the ground stated by Fitz Gibbon, L.J.

But, speaking for myself, I am of opinion that the document in question created an equitable charge, and that upon this ground the decree of the Master of the Rolls is right. It is now settled, after some conflict of opinion, that any instrument in writing for value, from which an intention can be collected to create a security for a debt on any property of the grantor, whether existing or future, and whether localized by the instrument or not, will create a charge by way of equitable mortgage on such property, and if it be future property when it accrues. Cases like *Holroyd* v. *Marshall* (1) have established one branch of that proposition, and the numerous cases of which *Abbott* v. *Stratten* (2) is an example have established the other branch of it.

The question, therefore, is entirely one of construction of the document of 29th December, 1900, taking into account the situation of the parties. Miss Molony was tenant of a grass farm under the Duke of Leinster, at a judicial rent, and she was in the habit of working that farm through a salesmaster, who made advances to her, let the farm in the proper season for grazing or meadowing, or sold the meadow on foot, and repaid himself out of the proceeds before he handed over the money. In November, 1900, and for some time previously, Mr. Patrick O'Connor, the defendant, had been her salesmaster, and he held her title deeds as security for his advances, which on the 21st November, 1900, amounted to £112 17*s.* 7*d.* Miss Molony, who was in difficulties, and owed rent to her landlord, thought she could make better terms with another salesmaster, and she went to the plaintiff, Mr. Coonan. He was willing to pay off O'Connor, and pay the rent if he got security. She got up her papers from O'Connor, and deposited them with the plaintiff, who in addition stipulated for and got the agreement of the 29th December, 1900. There is no doubt he paid the £200 mentioned in it, and more subsequently.

(1) 10 H. L. Cas. 191. (2) 3 J. & L. 603.

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I assume the deposit of the papers which she transferred from O'Connor to the plaintiff made the latter an equitable mortgagee, and gave him a security for her debt and interest, but he acquired no right to the possession, and no right of dealing with the land either as salesmaster or otherwise. He was not content with the remedy which a Chancery action would afford, but wanted one which would put him in privity with the profits of the land, and give him also a salesmaster's profits. He also wanted a security which could be worked out during the coming season. Hence this agreement, of which he appears to have kept forms in print.

It will be observed that whatever right she confers under this instrument is as security for his advances. What is the subject of the security?—"The authority to let and manage my farm for grazing, meadow, or other purpose," and repay himself. There was, of course, no meadow, or crop, on the lands on the 29th December. I think the authority involved the power to enter on the lands, whether for management or letting, and repay himself. The appointment of Coonan as auctioneer and salesman was the mode by which he could or would realize his debt, and obtain also the benefit of commission. Whether the authority be conferred in the form of a power of attorney, or any other manner, is immaterial, if the intention to create a security appears. All the text books put it in that way, *e.g.* Coote on Mortgages, p. 307 :—"A power of attorney authorizing a party to take possession of lands and hold them until paid a certain sum amounts to a contract to charge, and is not revoked by the death of the grantor," and for this he cites *Abbott* v. *Stratten* (1) and *Spooner* v. *Sandilands* (2). The governing words of this instrument are—"Assign to you as security therefor the authority to let and manage." On the face of the instrument the authority is irrevocable, but those words are not needed.

If he did not get enough by his letting and management, she was bound personally to make good the deficiency by the 1st November, 1901.

If the document created a security on the lands by way of

(1) 3 J. & L. 603. (2) 1 Y. & C. Ch. Cas. 390.

charge, the Bills of Sale Acts have no bearing on the case, even if the crops were *in esse* when the charge was given. The security here could be effectually worked without the element of growing crops at any time entering into it—for instance, if he let the lands for grazing, which I may observe was the primary mode of dealing contemplated.

If the document is an equitable charge, it carries interest by virtue of its character, and in that respect there is a material difference in result between me and the other members of the Court, who have considered that the plaintiff is not entitled to interest, and even apart from its being a charge, I may observe that the right to interest at some rate was never questioned. It was allowed in the accounts submitted, and I rather think no one would be more surprised than Mr. O'Connor to hear that a sales-master is not entitled to interest against his customer for his advances.

HOLMES, L.J.:—

The foundation of this action is the agreement of December, 1900, and it is my duty as a Judge to place a construction on this document; but I am not called on to give it a legal name, or to bring it within any familiar category. Indeed it would be difficult to do so, inasmuch as its provisions are probably unique. It is unlike anything to be found in reported cases, and I have not seen in my own experience a similar agreement. Still I think its construction is easy. Its object is to give the plaintiff a security for £200 advanced by him to Miss Molony; and it is to be noted that it is to cease to operate as a security on the 1st November following its execution. If before that time the full amount of the debt would not be realized by means of it, the balance then due could only be recovered by action in the ordinary way. I can find in it no provision for conferring on the plaintiff any interest in the lands, or for transferring to him the crops or natural produce thereof, or for enabling him to enter into possession. There is no assignment of anything in the legal sense. It is simply an authority given by the owner of the land to the plaintiff as her agent to let or auction the use of the land for grazing, meadowing, or cropping during the coming season, and to apply the price

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received by him therefor towards payment of his debt. Being both by express declaration and on legal principle irrevocable, it secured to the plaintiff an interest, not in the lands, or in the crops, but in the money which would reach his hands by virtue of its provisions, and Miss Molony could certainly be restrained by injunction from either preventing him from auctioning the grazing, meadow, or crops, or from receiving the proceeds. Can she do through an agent what she could not have done herself? Could an auctioneer, appointed by her to sell the produce of the lands in breach of her contract, have been restrained from proceeding with the sale or receiving the price from the purchasers? I am of opinion that he could, and the contrary has not been argued. I assume that Mr. O'Connor when he sold the meadow had no notice of the agreement with the plaintiff; and if he had received the purchase-money and handed it over to Miss Molony while he was still in this state of ignorance, he would have been free from liability, and the only remedy would have been against the lady. This, I think, follows from construing the document of December, 1900, as being neither an assignment of the crops nor a transfer of an interest in the lands. But once the terms of the agreement were brought to his notice, the proceeds of the sale then in his hands, or thereafter reaching him, could not have been given by him to a person to whom they did not belong, even although such person had employed him. I am unable to understand Mr. O'Connor's action, and I think that there must be something more in the case than what has been disclosed. He admitted in his evidence that if he had known of the agreement before the sale, he would have had nothing to do with the business. The day after notice of it reached him he was authorized by Miss Molony to apply the proceeds towards payment of the plaintiff's debt. No adequate explanation has been given of why he did not act on this authority. The result unfortunately is that he has been involved in this litigation, and must bear the consequences.

Solicitors for the plaintiff: *Thomas Geoghegan & Son.*
Solicitor for the defendants: *Patrick Rooney.*

R. D. M.

IN THE MATTER OF THE ESTATE OF JOSEPH HALL, OWNER; WILLIAM JOHN TALBOT, PETITIONER.

Ross, J.
1903.
April 21, 27.
May 18.

Mortgage—Redemption—Stock—National Debt Conversion Act, 1888, *section* 21 (1).

Trustees sold, in 1854, a sum of £4226 11*s.* 4*d.*, 3 per cent. Irish Consolidated Annuities, and lent the proceeds on a mortgage. The proviso for redemption provided for the repurchase and transfer into the names of the trustees "of the said sum of £4226 11*s.* 4*d.* Government 3 per cent. Irish Consolidated Annuities, . . . or, in case the said Government Irish 3 per cent. Consolidated Annuities shall have then ceased to exist," provided for the repurchase of "the like amount of some other Government Stock or Funds, producing at the time of such repurchase and transfer dividends at the rate of £3 per cent. per annum at the least." Government 3 per cent. Irish Consolidated Annuities subsequently ceased to exist. The mortgagor offered to redeem by the transfer of £4226 11*s.* 4*d.* New 2½ per cent. Consols:—

Held, that the contract did not come within section 21 of the National Debt Conversion Act, 1888, as a contract "to transfer generally any amount of 3 per cent. Stock," and that a 3 per cent. Stock should be transferred.

MOTION on behalf of the owner for an order that upon his transferring into the name of the petitioner the sum of £4226 11*s.* 4*d.* New 2½ per cent. Consols in the books of the Governor and Company of the Bank of Ireland, being the amount payable to the petitioner under the proviso for redemption contained in an indenture of mortgage, dated the 26th of January, 1854, and made between William Robert Seymour Fitzgerald of the one part, and John Talbot and William John M'Loughlin of the other part, vested in the petitioner, and on foot of which the petition herein had been presented, and paying to the petitioner all interest due on foot of the sum of £4000 secured by the mortgage up to the date of the transfer, together with the costs of the petitioner in the proceedings, to be taxed and ascertained, or on lodging the said sum of £4226 11*s.* 4*d.* 2½ Consols and the said interest and costs in Court, the petition should be dismissed.

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The petition had been filed on the 11th of January, 1903, on foot of the mortgage, and on the 12th of February a conditional order for sale was made. The owner was desirous of paying off the petitioner, and the question arising on the motion was what species of Government Stock should be transferred to the petitioner, having regard to the form of the proviso for redemption in the deed of mortgage of the 26th of January, 1854.

The mortgage contained recitals that the mortgagor, having purchased the lands of Clooney for £10,700, required a sum of £4000 to complete the purchase, which sum the mortgagees agreed to advance him; that at that time the sum of £4000 was invested in Government 3 per cent. Irish Consolidated Annuities, and that to produce the amount of £4000 it was necessary to sell out £4226 11*s.* 4*d.* of the Irish Consolidated Annuities. The proviso for redemption was in the following terms:—

"Provided always, and it is hereby agreed and declared between and by the parties hereto, that if the said William Robert Seymour Fitzgerald, his executors, administrators, and assigns, shall and do on the 9th day of December in the present year 1854, at his and their own costs and charges, repurchase and transfer, or cause to be repurchased and transferred, in and into the name or names of the said John Talbot and William John M'Loughlin, or the survivor of them, or the executors or administrators of such survivor, their or his assigns, in the books of the Governor and Company of the Bank of Ireland the said sum of £4226 11*s.* 4*d.*, Government £3 per cent. Irish Consolidated Annuities, exclusive of dividends, or, in case the said Government Irish 3 per cent. Consolidated Annuities shall have then ceased to exist, do and shall in the like manner repurchase and transfer to the said John Talbot and William John M'Loughlin, and the survivor of them, his executors and administrators, or his and their assigns, the like amount of some other Government Stock or funds producing at the time of such repurchase and transfer dividends at the rate of £3 per cent. per annum at the least," John Talbot and William John M'Loughlin would reconvey the lands to the mortgagor. There was further a covenant to repurchase stock in the same words. This mortgage was transferred by deed of the 17th of August, 1881, to the petitioner. The

owner offered to transfer the sum of £4226 11*s.* 4*d.* New 2½ Consols, which the petitioner refused to accept.

Mr. Joseph Bewley, a member of the Dublin Stock Exchange, made an affidavit stating that the securities which were known as Irish 3 per cent. Consolidated Annuities were the portion of the 3 per cent. Consolidated Annuities of the United Kingdom, which were standing in the books of the Governor and Company of the Bank of Ireland, and which were transferable at the Bank of Ireland, and that they continued to be known as Irish 3 per cent. Consolidated Annuities down to the year 1888; that they were interchangeable with the 3 per cent. Consolidated Annuities transferable at the Bank of England; and that by the National Debt Conversion Act of 1888 the Consolidated 3 per cent. Annuities (including therein the portion known as Irish 3 per cent. Consolidated Annuities) were converted into 2¾ (now 2½) per cent. Consols, and were represented by them.

O'Connor, K.C. (with him *Pierce Nolan*), for the owner:—

Under the National Debt (Conversion) Act, 1888, the New 3 per cent. Stock was converted into 2¾ per cent. until 1903, and 2½ thenceforth, dissentient stockholders were directed to be redeemed, and provision was made for the conversion of the Consolidated 3 per cent. and Reduced 3 per cent. By section 21 (1) "an agreement to transfer any amount of New 3 per cent. Stock, Consolidated 3 per cent. Stock, or Reduced 3 per cent. Stock, or generally any amount of 3 per cent. Stock, may be satisfied by making a transfer of an equal amount of new Stock." This section in effect enacts that to satisfy any legal obligation the new Stock can be substituted for the old Stock; and the same principle underlies sub-section 2 of section 21. See also section 25 (2), which enacts that in any "instrument executed before the passing of this Act, references to any Stock liable to be converted or exchanged in pursuance of this Act may, if the Stock is so converted or exchanged, be construed as references to new Stock." The Stock referred to in the mortgage was called Irish, because it was transferable in the books of the Governor and Company of the Bank of Ireland; it was also capable of being transferred in the books of the Bank of England. In *Duke of Northumberland*

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v. *Percy* (1), where there was a proviso to redeem a rentcharge by transferring a specified amount of 3 per cent. annuities, it was held by North, J., that the rentcharge could, under section 25 (2), be redeemed by the transfer of $2\frac{3}{4}$ per cent. Stock. This was followed by Kekewich, J., in *In re Howell Shepherd*; *Churchill* v. *St. George's Hospital* (2), where it was held that "instrument" in that section includes a will. In *In re Borough's Estate* (3), where the covenant was to transfer a specified amount of New 3 per cent. Stock, it was held that the mortgage was redeemable on the transfer of new Consols.

Samuels, K.C., and *A. C. Meredith*, for the petitioner:—

Under the special form of the proviso for redemption in the mortgage the petitioner is entitled to a 3 per cent. Stock, such as Local Loans, under the Act of 1887, Exchequer bills, or India 3 per cent. The Irish Consolidated Annuities have ceased to exist.

Under 25 Geo. 2, c. 27, a Consolidated 3 per cent. Stock was created, transferable at the Bank of England. Under 56 Geo. 3, c. 98, the consolidated funds of Great Britain and Ireland were united into one consolidated fund. Under 5 Geo. 4, c. 53, English 3 per cent. Consols and English 3 per cent. Reduced were made transferable into new Stocks called Irish 3 per cent. Consols and Irish 3 per cent. Reduced respectively. Under 7 Vict. c. 5, s. 1, the $3\frac{1}{2}$ Stocks were reduced in interest to $3\frac{1}{4}$ per cent. till 1854, and thenceforth to 3 per cent.; and by section 15, contracts to transfer the $3\frac{1}{2}$ are directed to be satisfied by the transfer of the lower Stock. Under 33 & 34 Vict. c. 71, s. 5, the several Stocks mentioned in the schedule thereto became part of the National Debt, and continued to be transferable in the books of the Banks of England and Ireland. Under 51 Vict. c. 2, the New 3 per cent. Stock, created under the Act of 1870, was converted, and dissentient stockholders were paid off; and by section 8 (1) the holders of Consolidated 3 per cent. Stock or Reduced 3 per cent. Stock were empowered to exchange their Stocks for an equal amount of new Stock. But that Act only dealt with these three Stocks. It did

(1) [1893] 1 Ch. 298. (2) [1894] 3 Ch. 649. (3) 31 L. R. Ir. 244.

not deal with all Government Stocks or funds producing 3 per cent. It did not affect, for example, India 3 per cent. or Local Loan Stocks. It did not in any view deal with all Government Stocks *or funds* producing 3 per cent. *at the least.* Section 21 (1) only deals with the three named Stocks. It deals with these three, whether described particularly as "New 3 per cent.," "Consolidated 3 per cent.," or "Reduced 3 per cent.," or described generally as "3 per cent.," i.e. *eo nomine* "3 per cents.," which was the general or common designation for the three classes of Stock. Section 21 (2) also clearly is restricted to them. Section 25 (2) has no application to Stock mortgages, which are dealt with by section 21. It deals, too, only with cases where Stock liable to be converted or exchanged under the Act has actually been converted or exchanged, and so could not possibly apply. *Northumberland* v. *Percy* (1) is against the latter view, but see the note at foot of the report of that case in 62 L. J. Ch., p. 334, from which it appears that there was an appeal taken, but a compromise agreed to.

There is nothing to prevent a person contracting out of the provisions of a future Act of Parliament, and the present mortgage was a contract out of the prospective operation of the Act of 1888. See *Arundell* v. *Arundell* (2), which shows that a person could contract out of the Stock Redemption Act: see also *Ferguson* v. *Bradstreet* (3). As the Irish Consolidated Annuities have ceased to exist, as anticipated by the latter portion of the proviso for redemption, that part of the proviso applies. This mortgage in the present case is different from the common form which is given in Davidson, vol. ii., part 2 (4th edition), p. 624. The Act of 1888 aims at a mortgage in this common form.

Nolan, in reply:—

The words "generally any amount of 3 per cent. Stock" mean that a mortgage containing general words to transfer a 3 per cent. Stock can be satisfied by the transfer of the new Consols; and that portion of the section is not restricted to the three classes of Stock referred to.

(1) [1893] 1 Ch. 298. (2) 1 M. & K. 316. (3) 22 L. R. Ir. 303.

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May 18.

Ross, J. :—

This is an application on behalf of the owner that upon his transferring into the name of the petitioner the sum of £4226 11*s.* 4*d.*, New 2½ per cent. Consols, and paying the costs incurred in this matter, the petition may be dismissed.

The question in dispute depends on the construction of the National Debt Conversion Act of 1888, and of the terms of a mortgage deed dated 26th January, 1854. The mortgagor's estate is vested in the present owner; the mortgage is vested in the present petitioner, who has filed the present petition for the purpose of realising the amount of the mortgage.

From the recitals in the mortgage deed it appears that the sum originally borrowed was £4000. The funds out of which the £4000 was advanced were at that time invested in Government 3 per cent. Irish Consolidated Annuities. The amount of Stock sold to realise £4000 cash was £4226 11*s.* 4*d.*

There is a recital to the effect that on treaty for the loan, and in order to secure the lenders from loss by reason of the sale of such Stock, it was agreed that the borrower should re-purchase and transfer into the names of the lenders the said sum of £4226 11*s.* 4*d.* of the said Government 3 per cent. Irish Consolidated Annuities, or should, in case that the said Government 3 per cent. Irish Consolidated Annuities should at the time of such repayment and transfer have ceased to exist, in like manner purchase and transfer a like amount of some other Government Stocks or funds producing at the time of such repayment or transfer at least 3 per cent. per annum dividend. The proviso for redemption follows the recited agreement.

Government 3 per cent. Irish Consolidated Annuities have ceased to exist.

It is now also clear that securities are procurable that would answer the description of "other Government Stocks or funds producing at least 3 per cent. per annum dividend."

This would be the end of the matter were it not for the provisions of the National Debt Conversion Act, 1888. Now it is plain that the draftsman of the deed intended to guard against possible legislation. He was aware that similar things had been done in the past, and he did his best to provide against loss

that might accrue to his clients if the 3 per cents. were converted into a stock of lower denomination.

It is possible to contract oneself out of possible legislation. See Maxwell on Statutes, p. 552; *Ferguson* v. *Bradstreet* (1).

The question is, has the conveyancer been successful?

I do not think that any of the reported cases dealing with the Act of 1888 touch the point.

We have here a contract between the parties. We have a recital that the object of the proviso in the contract was to prevent loss to the lender. The statute by which it is sought to alter the contract must be very strictly construed against those who seek to apply it. The applicant cannot rely on the first term in the proviso, *i.e.* to transfer Government 3 per cent. Irish Consolidated Annuities; he cannot be allowed to say that he is ready to give the statutory equivalent, because he has contracted, in the event of such Stock having ceased to exist, that he will give something else and something different.

The first thing to be observed is this, that the Act does not deal with all Government 3 per cent. Stock. It deals with three classes of 3 per cent. Stocks created at different times and under different statutes—(1) New 3 per cent. Annuities, or New 3 per cents.; (2) Consolidated 3 per cent. Annuities; (3) Reduced 3 per cent. Annuities.

The object of the statute is to convert these, and these only, into a Stock of a lower denomination.

Section 25 of the Act does not, in my opinion, apply. It is conversant with a case where an Act passed, or a deed or will executed before the Act deals with any of these three classes of Stock. It directs how the provisions of such Act, deed, or will are to affect the new Stock substituted by the conversion of the money realised by the redemption.

The section that expressly deals with the questions arising on an agreement to transfer is section 21,

It enacts that where there is an agreement to transfer any of the three classes of Stocks, or generally any amount of 3 per cent. Stock, the obligation may be satisfied by transferring an equal amount of new Stock.

(1) 22 L. R. Ir. 303.

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What is the meaning of the words "or generally any amount of 3 per cent. Stock"? I think that four agreements are contemplated. (1) An agreement to transfer New 3 per cent. Stock; (2) an agreement to transfer Consolidated 3 per cent. Stock; (3) an agreement to transfer 3 per cent. Reduced Stock; (4) an agreement to transfer 3 per cent. Stock *eo nomine*, without particularizing which of the three classes is to be transferred. Can the agreement in this deed come under No. 4? Here we have an agreement to transfer a like amount of some other Government Stock or *funds* producing at the time of such repayment or transfer *at least* 3 per cent. per annum dividends.

I think it is impossible to hold that such a contract is a contract "to transfer generally any amount of 3 per cent. Stock" within the meaning of the section. Therefore, I am of opinion that the present applicant can derive no assistance from the section, and that he must substantially fulfil his contract before the petition can be dismissed.

Motion refused with costs (1).

Solicitor for the owner: *Richard A. Macnamara.*
Solicitors for the petitioner: *Meredith & Sons.*

W. C. S.

(1) Notice of appeal was served, but terms of compromise were agreed to.
W. C. S.

FULLERTON and Another, Appellants; PROVINCIAL BANK OF IRELAND, Respondents.

H. L.
1903.
July 3.

Registry Act (6 *Anne, Ir., c.* 2)—*Equitable mortgage—Deposit—Antecedent letters—Agreement in writing.*

Held, reversing the decision of the majority of the Court of Appeal in *In re Stevenson's Estate* ([1902] 1 I. R. 23), that the letters amounted to an agreement to create an equitable charge upon the estate, and in default of registration ranked after the mortgage to the appellants (objectors in the Court of the Land Commission).

Appeal by Messrs. Stevenson and Fullerton from the judgment of the Court of Appeal ([1902] 1 I. R. 23).

Wylie, K.C., and *Henry, K.C.* (with them *R. E. Osborne*), for the appellants.

The Solicitor-General (*Campbell, K.C.*), and *Gordon, K.C.* (with them *G. W. Walker*), for the respondents.

The House of Lords (Lords Macnaghten, Shand, Davey, and Lindley) reversed the order of the Court of Appeal, and restored the order of Meredith, J., with costs (1).

Solicitors: *Wansey, Bowen, & Co.*, for *J. K. Reid*, and *Farrer & Co.*, for *J. Tweedy.*

(1) [1903] A. C. 309.

V.-C.
1903.

April 27.
July 31.

BERRY *v.* FISHER.

(1903. No. 208.)

Will—Construction—Meaning of issue.

A testator bequeathed the sum of £600 upon trust, to pay the income thereof to his daughter M. for her separate use; and in case of her marrying and leaving lawful issue, then the said interest and principal moneys were to pass to such issue in such manner as was described relative to the issue of her sister J., which was as follows:—"In case of the death of my said daughter leaving issue, said interest money to be paid and payable to such issue, if more than one, share and share alike, for their support and education, and on their respectively attaining the age of twenty-one years, such principal sum, and such other sum as they or their said mother may be entitled unto in this will, shall be divided among them, share and share alike." After providing further for several events, which did not happen, the testator directed that in case of the death of any of his children leaving lawful issue, the share or shares of such child or children should go respectively to the lawful issue of such child or children, if more than one, share and share alike. M. survived testator, and having died, leaving several children and grandchildren, the question arose whether the £600 was divisible among her children only *per capita*, or among her children and grandchildren *per stirpes*:—

Held, that the fund was divisible among all her children and remoter issue living at the period of distribution.

By his will, dated 10th December, 1836, Robert Elliott bequeathed his property to trustees in trust *inter alia* to pay to his daughter Jane Elliott, otherwise Fleming, the interest of the sum of £500, to be paid to her on her sole and separate receipt, and for her sole and separate use, notwithstanding her present or any future coverture; said principal sum of £500 and said interest money to be free from the control, debts, or interference of her then husband or any future husband. The will then contained the following provisions:—"And in case of the death of my said daughter leaving issue, said interest money to be paid and payable to such issue, if more than one, share and share alike, for their support and education, and on their respectively attaining the age of twenty-one years, such principal sum and such

other sum as they or their said mother may be entitled unto in this will shall be divided among them, share and share alike; and in further trust to pay to my said daughter, Mary Anne Elliott, the interest money of £600 at such rate as could be obtained on good security as aforesaid, and in trust to pay to my said daughter, Sarah Elliott, the interest money of £600 at such rate as aforesaid, said interest money of said two sums of £600 sterling each to be paid to my said daughters half-yearly on their sole and separate receipt, and for their sole and separate use, notwithstanding any coverture or marriage whatsoever, and freed and discharged from any debts, incumbrances, charges, or interference of any husband or husbands of them, the said Mary Anne Elliott and Sarah Elliott, and in case of the said Mary Anne Elliott or Sarah Elliott, or either of them, marrying and leaving lawful issue, then the said interest and principal moneys, and such other sums as they may be respectively entitled unto under this will, to go and pass in such manner and form to such issue as is hereinbefore particularly described relative to their sister, the said Jane Elliott, otherwise Fleming's issue." The testator also provided that in case of his said daughter Jane dying without issue living at the time of her decease, the interest of said legacy should be paid to her husband, should he survive her, during his life, and in case either of his daughters Mary Anne or Sarah, being married and dying, leaving no issue her surviving at the time of his decease, the interest of the respective legacies was to be paid to the husband of his said daughter so dying, if he survived her, for his life, and if any of his said daughters died without lawful issue surviving at the time of her decease, unmarried, or leaving no husband her surviving, the share of his said daughter so dying was to go, share and share alike, to his surviving daughters and his son, Samuel M'Dowell Elliott, and if more than one of his said daughters should die without issue surviving at her decease, unmarried, or leaving no husband, the share of his said daughter so dying was to go to his surviving daughter and his son, Samuel M'Dowell Elliott, share and share alike, and to their respective issue, and in case of all his daughters leaving no issue them surviving, or unmarried, or leaving no husband or husbands them surviving, said legacies were to go to and be paid to his residuary

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legatee, and in case of the death of any of his children leaving lawful issue the share or shares such child or children would be entitled to were to go to the lawful issue of such child or children, if more than one, share and share alike.

The testator left him surviving his said son and daughters, of whom the said Mary Anne Elliott afterwards intermarried with the Rev. John Fisher, and died on the 17th August, 1902.

Mary Anne Fisher had the following children:—Robert Elliott Fisher, who went to Auckland, New Zealand, many years ago, and died there, leaving one daughter, who was believed to be still alive; John Fisher, who went to New York and died there, leaving several children surviving him; Samuel Fisher, who died intestate and unmarried; Sarah Elliott Fisher, and Mary Elliott Fisher, two of the defendants; William Fisher, who went to Australia thirty years previously, and had not been heard of for fifteen years; it was believed he married and had children; James Berry Fisher, who died in Dublin, leaving one daughter, Ina, the remaining defendant; and Annie, who intermarried with Alexander Montgomery, and died leaving no children.

The present summons was taken out by the trustees of the will, James F. Berry, David H. Crawford, and Turner J. Fisher, to have the question determined whether the legacy of £600 bequeathed to the issue of Mary Anne Elliott was divisible, under the terms of the will, among her children only *per capita*, or among her children and grandchildren *per stirpes*.

W. Martin M'Grath, for the plaintiffs.

M'Ilroy, for the defendants Sarah and Mary Fisher:—

My contention is that issue means children, and that, therefore, remoter issue are excluded. The words "such principal sum, and such other sum as they or their said *mother* may be entitled unto in this will," are very important. The general meaning of the word "issue" is restrained where it is coupled with the word father, mother, or parent. Here the word "mother" is used, and this shows a clear intention on the part of the testator to restrict the meaning of "issue": Jarman on Wills, p. 949; *Sibley* v. *Perry* (1);

(1) 7 Ves. 522.

Martin v. *Holgate* (1); *Smith* v. *Horsfall* (2). In *Ross* v. *Ross* (3) the testator explained the word issue, and it has no application to the present case. The issue to take must be children who survived the tenant for life. The words are "leaving issue," that is at death: *Sheffield* v. *Kennett* (4); *In re Watson's Trusts* (5).

Bulloch, for Ina Fisher, a grandchild of deceased:—

Issue here includes grandchildren. The gift is not merely limited to a child, but there is also a gift over in default of issue of the first taker, which is an argument against construing issue as children: *Re Kavanagh's Will* (6); *Ralph* v. *Carrick* (7). Where the word parent, or father, or mother, is not used in the sense of the first taker, whose share the issue are to take by substitution, it will not have the effect of restricting issue to children: Theobald on Wills, p. 291; *Ross* v. *Ross* (3). The clause relied on is ambiguous in terms, and must be read in connection with a subsequent clause in the will, where the same intention is expressed in unambiguous terms, and which shows that the testator intended to include remoter issue.

July 31.

THE VICE-CHANCELLOR:—

This summons is brought by the trustees of the will of Robert Elliott for an order determining the question whether a legacy of £600, stated to have been bequeathed by said will to the issue of Mary Anne Elliott, is divisible, under the terms of the said will, amongst her children only *per capita*, or amongst her children and grandchildren *per stirpes*. This sum of £600 was bequeathed in trust, to pay to his daughter Mary Anne the interest of said sum half-yearly for her separate use, and free from the control of her husband in case she should marry; and in case of her marrying and leaving lawful issue, then the said interest and principal moneys, and such other sums as she might be entitled to under the will, were to go and pass in such manner and form to such issue as was thereinbefore described relative to the issue of her sister Jane Elliott, and in case of the said Jane dying without issue living at the time of her decease, then upon certain trusts, which did not

(1) L. R. 1 H. L. 175.
(2) 25 Beav. 628.
(3) 20 Beav. 645.
(4) 27 Beav. 207.
(5) L. R. 10 Eq. 36.
(6) 13 Ir. Ch. R. 120.
(7) 11 Ch. D. 873.

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arise, and in case of Mary Anne being married and dying leaving no issue (an event which did not happen), to pay the interest to her husband for life; and if any of his said daughters should die without lawful issue surviving at the time of her decease, unmarried, or leaving no husband her surviving (an event which did not happen), the share of said daughter was to go as therein mentioned; and in case of the death of any of his children leaving lawful issue, the share or shares which such child or children would be entitled to were to go respectively to the lawful issue of such child or children, if more than one, share and share alike. This last event was that which happened.

Mary Anne married, and died, leaving several children and grandchildren, as to whose rights the present question arises. That question is, whether the parties now entitled to this sum of £600 are all the descendants of Mary Anne Fisher living at the time when it became distributable, or whether it is distributable only amongst the three children of Mary Anne Fisher. This is another instance of the contest as to the meaning of the words "die without issue." It may still, I think, be regarded as settled that the word "issue," when not restrained by the context, comprehends objects of every degree. This, therefore, is *prima facie* the meaning of the word, and it lies on anyone contending for a narrower interpretation to maintain that the context has this effect. It seems to be unsafe to rely on mere general and vague terms as showing a general intention, which are often little better than conjectures. In the will in this case there is a clause which was much relied on as showing that the general rule does not apply, which is in the following terms, viz.:—"In case of the death of my said daughter leaving *issue*, said interest money to be paid and payable to such issue, share and share alike, for their support and education; and on their attaining twenty-one years, such principal sum, and such other sum as they *or their said mother* may be entitled unto in this will, shall be divided among them, share and share alike." It was contended that the reference to the mother of such issue shows that there the issue must be confined to the children of such daughter, and that this is sufficient to confine to children all the gifts to issue, according to Lord Eldon's decision in *Sibley* v. *Perry* (1). I do not feel justified in applying that

(1) 7 Ves. 522.

decision to the will in the present case, as here the word "issue" is used so frequently in the technical meaning of the word that I think it would not be safe to hold that an expression not more directly pointed to the question was sufficient to countervail the force of the general principle.

I shall therefore hold that the fund in question is divisible among all the children, grandchildren, and remoter issue, if any, living at the period of distribution.

Solicitors for the plaintiffs: *Carson & M'Dowell.*
Solicitors for the defendants: *Blackburne* and *G. O. Lytle.*

J. MACM.

THOMPSON *v.* BELL.

(1900. No. 80.)

Will—Mortgage debt—Locke King's Act (17 & 18 *Vict. c.* 113)*—Amendment Act* (30 & 31 *Vict. c.* 69)*—Contrary intention.*

A testator bequeathed his business and the premises in which it was carried on, which were leasehold premises, to his son W., subject to payment of all debts and liabilities owing in respect of the business; he bequeathed his personal estate on trust for conversion, and directed his funeral and testamentary expenses, debts, and legacies to be paid out of the proceeds; and, subject thereto, for his children equally.

The testator had deposited with his bankers the lease of the business premises to secure a private debt:—

Held, that the intention of the testator was that W. should take the business premises subject to the trade debts only; that this was a declaration of intention contrary to Locke King's Act, and that the business premises were exonerated from liability in respect of the private debt secured by equitable mortgage.

In re Nevill (59 L. J. Ch. 511) considered and followed.

FURTHER CONSIDERATION.

This was an action to administer the real and personal estate of William Bell, and to carry out the trusts of his will. William Bell carried on business for above twenty-five years,

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at Gordon-street, Belfast, as a commission agent for the sale of whiskey, beer, and porter. The business, though carried on under the name of William Bell & Co., was entirely carried on by him; he was the sole owner, and had no partner. He had only one bank account, which he kept at the Ulster Bank, Belfast, in the name of "William Bell & Co." Into this account he paid all moneys received by him, whether in respect of his business or in respect of transactions not connected with that business, and drew upon this account for all moneys required by him in the course of his business, for investments made by him in various stocks and shares, and in the purchase of real or leasehold property, and for personal purposes. William Bell died on November 28, 1895, leaving his widow, Elizabeth Bell, and four children, William Bell, Henry Coote Bell, Mary Bell, and Elizabeth Tannahill Thompson, wife of the plaintiff Archibald Thompson.

At the time of his death William Bell was possessed of real estate consisting of fee-farm rents issuing out of premises in Belfast, amounting in all to the yearly sum of £716 17*s.* 2*d.*, and of the estimated value of £12,160 5*s.* 6*d.* He was also possessed of considerable personal estate of the total value of £37,263 8*s.* 11*d.*, which included the premises in Gordon-street, Belfast, in which his business was carried on, held for a term of years, of the value (exclusive of the goodwill of the business) of about £600. At the time of his death William Bell was indebted in the sum of £24,332 6*s.* 3*d.*, which included a sum of £9,874 1*s.* 11*d.*, due to the Ulster Bank for overdraft on the banking account of William Bell & Co. The amount so due to the Ulster Bank for overdraft was partly secured by the deposit with the bank of the lease of the Gordon-street premises, in which he carried on his business, and certain fee-farm grants, reserving fee-farm rents, as above-mentioned. The equitable deposit was not for trade purposes.

William Bell, by his will, dated Sept. 3, 1890, appointed his wife, Elizabeth Bell, his executrix, and appointed her, James M'Garry, and the plaintiff Archibald Thompson trustees. The testator devised and bequeathed to his son William Bell, his heirs, executors, administrators, and assigns, for his and their absolute use and benefit, all his interest in the trade or business of a commission agent carried on by him, and the goodwill thereof, and the stock in trade, furni-

ture, and effects used or employed in the business, and all his estate and interest in the messuages and hereditaments in or upon which the business was carried on, and all the book and other debts due or owing to the business at his death, and the capital invested therein at his death, but subject to the payment and discharge of all trade debts and liabilities owing or subsisting at his death in respect of the said business, and also subject to and charged with payment as from the date of his death to his wife, Elizabeth Bell, during widowhood, of an annuity equivalent to thirty per cent. of the net profits of the said business in each year as ascertained in manner thereinafter provided, payable yearly, and he directed that William Bell should every year, as long as Elizabeth Bell continued his widow, have the accounts of the business audited by a chartered accountant, and the amount of such net profits so certified by such accountant to be taken as the amount of the net profits of the said business for the year, and he directed the trustees to have a valuation made of the business premises devised and bequeathed to William Bell, such valuation to be absolutely binding upon all persons interested under his will. The testator then devised all his real estate (including chattels real), except what he otherwise disposed of by his will, to his trustees upon trust to pay the rents and profits (after payment of rents reserved by fee-farm grants and leases) to Elizabeth Bell during widowhood, and subject thereto on trust for sale. He then bequeathed all his moneys, securities for moneys, goods, chattels, credits, and personal estate (except chattels real included in the general devise theretofore mentioned, and except what he otherwise disposed of by his will) to the trustees upon trust to sell, call in, and convert into money such parts thereof as should not consist of money, and should out of moneys produced by such calling in, sale and conversion of such parts of his personal estate thereinbefore bequeathed as should not consist of money, and out of the ready money of which he should be possessed at the time of his death, pay his funeral and testamentary expenses and debts, and the legacies (other than specific legacies bequeathed by his will), and invest the net residue, and pay the income to Elizabeth Bell during widowhood, and subject thereto to hold the net residue in trust for his children, who being sons should attain the age of twenty-one years of age, or being

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daughters should attain that age or marry under that age, as tenants in common in equal shares.

After the death of the testator, several questions arose with respect to which the trustees were unable to come to a unanimous decision, and this action was instituted by the plaintiff as one of the trustees against Elizabeth Bell, James M'Garry, William Bell, Henry Coote Bell, Mary Bell, and Elizabeth Tannahill Thompson. The action came on for further consideration.

The only question which calls for a report was, whether the business premises specifically bequeathed to William Bell were primarily liable for the debts other than trade debts due to the Ulster Bank and secured *inter alia* by equitable mortgage of the lease of the premises, or whether they were exonerated from liability, and the debts payable out of the general personal estate bequeathed to the trustees. It was at first suggested that a sum should be agreed on as the proportion which the business premises should contribute towards the mortgage debt, but William Bell declined to admit any liability.

Serjeant Dodd (*Matheson, K.C.*, and *Denning*, with him), for the defendant William Bell:—

The intention of the testator is to charge the business premises, devised to William Bell, with trade debts only. A trade debt would include a mortgage debt incurred in respect of the trade, but the equitable deposit was not for trade purposes.

The residue is to be applied in payment of debts. This must mean debts other than trade debts, as the debts were not to be paid twice. There is a declaration of intention by necessary implication contrary to Locke King's Act. *In re Fleck* (1) and *In re Nevill* (2) are in point.

Gordon, K.C. (*M'Ilroy* with him), for the plaintiff:—

The gift of the business premises to William Bell is subject to payment of the debts and liabilities of the business. The Court is asked to read into the clause the word "only." *In re Nevill* (2) is distinguishable. The direction there was to pay debts "other

(1) 37 Ch. D. 677. (2) 59 L. J., Ch. 511.

than those hereinbefore provided for"; such words as these do not occur in the present will.

Jellett, K.C. (*W. H. Brown* with him), for the defendant Elizabeth Thompson:—

In the cases cited the testator divided his debts into two classes; he has not done so here. In *In re Nevill* (1), the business was left to one person, and the residue to others; here William Bell got the business and a share of the residue. In that case also the business was to exonerate the residue from the trade debts, and the residue was to exonerate the business from the other debts. There is no intention "declared by necessary implication referring to debts charged by way of mortgage on any part of his real estate" within the meaning of 30 & 31 Vict. c. 69. It is said that charging a particular class of debts on the business premises is equivalent to charging that class of debts only, and exonerating it from debts secured by mortgage on it, and putting them on the residue, but words would have to be read into the will to effect that. The word "only" does not occur.

Matheson, K.C., in reply:—

The only distinction between this case and *In re Nevill* (1) is that there the words "other than those hereinbefore provided for" occur; but that is immaterial; you have only to ascertain the intention appearing on the face of the will. If the testator meant by "debts" debts other than already provided for, 30 & 31 Vict. c. 69, does not apply.

THE MASTER OF THE ROLLS:—

June 3.

The question turns entirely upon the words "contrary or other intention" in Locke King's Act (17 & 18 Vict. c. 113, s. 1), which provides that "when any person shall after the 31st December, 1854, die seized of or entitled to any estate or interest in any land which shall at the time of his death be charged with the payment of any sum of money by way of mortgage, and such person shall not by his will, or deed, or other document, have signified any

(1) 59 L. J., Ch. 511.

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contrary or other intention, the heir or devisee to whom such lands shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to payment of all the mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportional part of the mortgage debts charged on the whole thereof." Such contrary or other intention is not to be gathered, in the case of persons dying after 1867, from a direction that his debts are to be paid out of his personal estate, nor in the case of persons dying after 1877, from a direction that his debts are to be paid out of his residuary real and personal estate (30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34). What words do indicate a contrary or other intention depends in the case of a will upon the construction of the instrument, and is *ex vi termini* a question of intention in each case.

In the will before me, the testator devises and bequeaths to his son William Bell, his heirs, executors, administrators, and assigns, for his and their absolute benefit, all his interest in the trade and business of a commission agent carried on by him, the goodwill thereof, and the stock in trade, furniture, and effects which should be used or employed in or belonging to such trade or business, and all his estate and interest in the messuages and hereditaments in or upon which the said trade or business was carried on, and all the book and other debts due or owing to the said business at his death, and the capital invested therein at his death, but subject to the payment and discharge of all trade debts and liabilities owing or subsisting at his death in respect of the said business, and also subject to and charged with payment as from the date of his death to his wife, Elizabeth Bell, during widowhood, of an annuity equivalent to thirty per cent. of the net profits of the said business in each year, as ascertained in manner thereinafter provided, payable yearly. He directed that William Bell should every year, as long as Elizabeth Bell continued his widow, have the accounts of the business audited by a chartered accountant, and the amount of such net profits certified by such accountant to be taken as the amount of the net profits of the said business for the year, and he

directed the trustees to have a valuation made of the business and premises devised and bequeathed to William Bell, such valuation to be absolutely binding upon all persons interested under his will. The testator then devised all his real estate (including chattels real), except what he otherwise disposed of by his will, to his trustees upon trust to pay the rents and profits (after payment of rents reserved by fee-farm grants and leases) to Elizabeth Bell during widowhood, and subject thereto on trust for sale. He then bequeathed all his moneys, securities for money, goods, chattels, hereditaments, and personal estate (except chattels real included in the general devise thereinbefore mentioned, and except what he had otherwise disposed of by his will) to his trustees upon trust to sell, call in, and convert into money such parts thereof as should not consist of money, and should out of the moneys produced by such calling in, sale and conversion of such parts of his personal estate thereinbefore bequeathed as should not consist of money, and out of the ready money of which he should be possessed at his death, pay his funeral and testamentary expenses and debts, and the legacies (other than specific legacies) bequeathed by his will, and invest the net residue and pay the income to Elizabeth Bell during widowhood, and subject thereto to hold the net residue in trust for his children, who being sons should attain twenty-one years of age, or being daughters attain that age or marry under that age, as tenants in common, in equal shares.

The scheme of the will is plain enough. The testator leaves his business and business premises to his son William, subject to the payment of all trade liabilities, which would, of course, include trade debts secured by mortgage; and not only is William bound, if he accept the bequest, to take it subject to this burthen, but he takes it subject to the gift of 30 per cent. of the net profits to his mother for life. These net profits are to be ascertained by an accountant. Are the trade debts secured by mortgage to be left out of account? Or is it not plain that they must be taken into the account in some shape, to carry out the intention? The business, business premises, goodwill, book and other debts due to the business, and the trade debts due by it, are thus put aside as a whole; segregated and withdrawn from the rest of the assets and liabilities. The subsequent general direction for payment

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of debts and legacies cannot refer to the trade debts already dealt with, which William was directed to pay, because the testator did not mean that they should be paid twice over, first by William, and then by the executors. In other words, the debts which the executors were to pay must mean debts exclusive of those which William was to pay. If this view of the meaning of the will is correct, it follows that the testator's intention was that trade debts should be paid out of the business; but that debts not being trade debts, and even if secured upon the business premises, should not; but should be paid by the executors and trustees, as in the subsequent part of the will directed. That is, there is a "contrary or other intention" on the face of the will.

The case of *In re Nevill* (1) bears a close resemblance to the present. The statement of the facts is long, but they are sufficiently summarised by Kay, J., at p. 513 of the report:—"In this case I understand the facts to be that the testator, the owner of considerable property, had in his lifetime carried on a large business as a baker. He had incurred debts, some of which related to his business, and also he had some private debts, of which a portion—and a very large portion—was secured by mortgage on property used for his trade, and also on property not used for his trade. In that state of things he made his will, and the general scheme of the will is, to give his trade property and the business itself to his son Robert, 'subject, nevertheless, to and charged, in exoneration of the rest of my estate, with the debts and liabilities owing by me at my death in connection with the said business,' and also subject to other charges which he made by his will. Then he deals with the residue of his estate, real and personal, by giving it to trustees, upon trust to sell and convert, and out of the moneys produced by such sale, and such part of his personal estate as should consist of money, to pay his funeral and testamentary expenses and 'debts other than those hereinbefore provided for,' and the legacies, and so on, and then he gives the ultimate residue on certain trusts in favour of his daughters." If it were not for the use of the words "in exoneration," where they occur in that case, the two wills would be practically identical,

(1) 59 L. J., Ch. 511.

and I was at first disposed to question whether those words did not constitute a distinction in substance. A charge of debts to establish a "contrary or other intention" must be in exoneration. Those words, however, need not be used if the sense be the same, and the question is, whether it is so or not. Still they do occur in *Re Nevill* (1). They occur, however, only once, and not in the context where they would be material for present purposes; for they are used in reference to the trade debts, charged upon the business premises "in exoneration" of the rest of the estate, and do not occur where the general debts, other than those already provided for, are directed to be paid out of the residuary real and personal estate. Had they not occurred in the will at all, the difficulty might not have arisen; but their use in one place, and not in the other, suggested that in the latter the charge of debts might not have been meant to be in exoneration of that on which the charge was primarily imposed. Kay, J., says, at p. 516:—"Now, I confess I felt some difficulty during the argument arising from this, that in the case of the gift to Robert Nevill of the business and business premises, the testator does say, in so many words, that that property is to bear the business debts 'in exoneration' of the rest of the estate; and when he comes to deal with the residue, he does not repeat those words 'in exoneration,' but he devotes the residue to the payment of all the private debts, but does not say in exoneration of the estate given to Robert. But to my mind the absence of such words does not create so much difficulty as at first I thought it must. It is impossible to suppose that the intention of the testator was to burden Robert with all the business debts, and, besides that, with the private debts, or such of the private debts as were charged upon the mortgage of the business property, because he distinctly says the business debts are to be paid out of Robert's estate, and paid exclusively thereout in exoneration of the rest of the estate, and the other debts are to come out of the residue of the real and personal estate. It seems to me that the repetition of the words 'in exoneration' would have been unnecessary, and that the absence of those words does not create any doubt or difficulty as

(1) 59 L. J., Ch. 511.

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to what the real intention of the testator, as expressed by his will, was—namely, to divide his debts into two classes, and make the property devised to Robert Nevill pay one class, and make what he calls the residue of his real and personal estate pay the other class of debts. That, I conceive, was his intention. That seems to me sufficiently expressed, and, in my opinion, the Acts which have been referred to do not, in the least degree, interfere with that construction of the will."

I think *In re Nevill* (1), correctly understood, is expressly in point, and is in accord with *In re Fleck* (2), in which no words of express exoneration occur.

I, therefore, think that the trade premises are exonerated from liability in respect of the mortgages other than such as were for trading liabilities.

Solicitors for the plaintiff: *Moorhead & Wood.*

Solicitors for the defendants: *Crawford & Lockhart*; *R. A. Howe.*

W. L.

M. R. 1903. June 24, 25. July 11.

MAXWELL *v.* TIPPING.

(1902. No. 1008.)

Mortgage—Collateral agreement—Once a mortgage always a mortgage—Equity of redemption—"Clog" on redemption—Independent agreement—Provision for increase of interest on mortgage debt—Collection of rents by mortgagee—Agency fees.

M., being previously indebted to T. in the sum of £1500 secured by mortgages on land, with interest at 5 per cent., in 1878, in consideration of a further advance of £300, gave his bond (on which judgment was subsequently entered, and which was registered as a judgment mortgage against the lands already mortgaged), and executed a collateral agreement by which he appointed T. his agent over the mortgaged lands, and empowered him to charge agency fees, and agreed to pay six per cent. interest on the whole £1800 due by him to T., being 1 per cent. additional on the £1500 secured by the mort-

(1) 59 L. J., Ch. 511. (2) 37 Ch. D. 677.

gages. This additional 1 per cent. rate of interest was not by the agreement charged on the lands:—

Held, that the agreement of 1878, being a new contract for a fresh consideration, had not the effect of imposing a fetter on the equity of redemption by reason of increasing the rate of interest payable, or by reason of making the mortgagee the agent of the mortgagor to receive the rents, and empowering him to charge agency fees.

TRIAL OF ACTION.

Prior to 1878 the plaintiff was indebted to Nathaniel Tipping in the sum of £1500, secured with interest at five per cent. by three indentures of mortgage of the lands of Tattykeel, county Tyrone, dated respectively 1st June, 1872, 16th June, 1875, and 26th October, 1876. (The first mortgage was security for £300 charged on the inheritance. The other two indentures were mortgages of plaintiff's life interest in the lands, and also of two policies of assurance and a reversionary interest in bank stock as security for £1200.)

On the occasion of a further advance of £300 by Nathaniel Tipping to the plaintiff, the plaintiff by bond dated the 4th October, 1878, became bound in the penal sum of £600, to pay Nathaniel Tipping the sum of £300, with interest at five per cent., and judgment was subsequently entered, and it was registered as a judgment mortgage of the plaintiff's interest in the lands of Tattykeel on the 31st October, 1878.

On the occasion of the advance of the £300, and the execution of the bond, a collateral agreement of the same date was entered into between the parties. The operative part of the agreement of the 4th October, 1878, was in these terms:—

First, the said Nathaniel Tipping shall collect and receive the rents of Tattykeel on the usual gale days, until the whole sum of £1800 be paid off.

Second, the said Nathaniel Tipping shall, out of said rents, pay all head-rent, tithe rentcharge, rates, taxes, and cesses, payable by the said George Maxwell in respect of said lands, and shall also pay the premium on the policies of assurance aforementioned as the same shall accrue due, and shall deduct and retain thereout the yearly sum of £90 sterling, that is to say, interest at the rate of £5 per cent. per annum on the

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said sum of £1800 debt charged on said lands, and shall finally retain and appropriate the remainder of the rents of said lands as receiver's fees, and in payment for all trouble and expenses he may incur as agent and receiver of said lands.

Third, the said George Maxwell shall make up the interest to be paid to the said Nathaniel Tipping to 6 per cent. per annum; the said Nathaniel Tipping receiving the yearly sum of £18 sterling, in twelve instalments of £1 10*s.* each, which he shall pay on the first of each month.

This agreement was proposed to Nathaniel Tipping by the plaintiff, being accompanied by a statement in plaintiff's own handwriting, made out by him at the date of the agreement. The terms of this statement or calculation are set out in the judgment of the Master of the Rolls.

After the date of the agreement Nathaniel Tipping received the rents and profits of the lands of Tattykeel, as receiver and agent of the plaintiff, and in management of the lands.

On 5th March, 1896, Nathaniel Tipping died intestate, and on 1st May following letters of administration of his estate were granted to his son, the defendant.

By his statement of claim in the action, delivered 12th of January, 1903, the plaintiff asked for a declaration that interest at the rate of 5 per cent. per annum, and no more, was payable in respect of the sum of £1800 (or so much thereof as was then due), secured by the indentures of mortgage of 1872, 1875, and 1876, the bond dated 4th October, 1878, and the judgment mortgage registered 31st October, 1878. It also asked for a declaration that the defendant, as being and representing the mortgagee in possession, was not entitled to receive or charge agency or receiver's fees, or other remuneration whatsoever, in respect of the collection and receipt of the rents of the lands of Tattykeel and the management of the mortgaged premises.

The plaintiff in the seventh paragraph of his statement of claim alleged undue influence and oppression or fraud on the part of Nathaniel Tipping in inducing him to execute the agreement of the 4th October, 1878, but this charge was negatived, and was abandoned by plaintiff's counsel at the trial.

Matthew J. Bourke, K.C. (with him *Colthurst*), for the plaintiff:—

The agreement of October 4th, 1878, is a clog on the equity of redemption, first, because the interest on the mortgages on the lands of Tallykeel is raised from 5 per cent. to 6 per cent.; secondly, because the agreement purports to empower the plaintiff to collect the rents of premises, and to charge commission on such collection, whereby the redemption is more burdensome on the plaintiff than it otherwise would be.

The additional 1 per cent. interest chargeable by the agreement is a clog on the equity of redemption. Even if the mortgaged lands are not charged with the additional interest, the receipt of 6 per cent. interest out of the rents of the lands was illegal, and the difference must be refunded. *Browne* v. *Ryan* (1) decides that when a mortgage is paid off, the land must be as free in the hands of the owner as if it had never been mortgaged at all, and any stipulation contained in the mortgage deed or collateral thereto inconsistent with this right cannot be enforced. That decision governs this case. *Noakes* v. *Rice* (2) approves of *Browne* v. *Ryan* (1). The principle is that a person who has mortgaged his property for a debt shall upon redemption have it back unfettered by any obligation except that for which the security was given.

The rule is that stated by the Master of the Rolls in *Jennings* v. *Ward* (3) in this way:—"A man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement."

In *Chapple* v. *Mahon* (4) there was a stipulation as to payment for commission beyond interest in case the mortgage was paid off. The commission contracted for was not charged on the mortgaged lands, but the agreement was held illegal and void as contrary to the nature of a mortgage security and a clog on the equity of redemption. See also *Edwards' Estate* (5).

As to agency fees; they are not allowable. A mortgagee in

(1) [1901] 2 Ir. R. 653, 671.
(2) [1902] A. C. 24.
(3) 2 Vern. 520.
(4) I. R. 5 Eq. 225.
(5) 11 Ir. Ch. R. 367.

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possession cannot charge for commission or allowance for his trouble beyond his actual expenses, and any stipulation or contract therefor is invalid: *M'Kinley's Estate* (1); *Kavanagh* v. *Workingman's Benefit Building Society* (2); *Chambers* v. *Goldwin* (3); *Comyns* v. *Comyns* (4). In *Parkinson* v. *Hanbury* (5), the point of the decision was this, viz. that Hanbury and Company were not held liable, because they had gone into possession under a contract with a third party (a prior mortgagee). On this ground they escaped liability.

Henry, *K.C.*, and *Donaldson* (with them *O'Connor*, *K.C.*), for the representative of Nathaniel Tipping, the original mortgagee:—

There was no fraud or undue influence in the transaction. Maxwell perfectly understood what he was doing, and the contract was fair and reasonable. The question then is, whether the Court is bound, as matter of law, to disallow that which the parties have contracted for. Apart from any question as to the policy of the law in these transactions, people should be bound by the contract they have entered into. The older authorities do show that a mortgagee cannot stipulate to be a receiver over the mortgaged property, or for any additional profit over and above principal, interest, and costs. The foundation of these decisions is based on the existence of the usury laws, and the principle of them no longer applies. The two Irish cases cited are distinguishable. In *Chapple* v. *Mahon* (6) there was such a provision as would undoubtedly be considered even now a clog on the equity of redemption, and in *Edwards' Estate* (7) the bargain was set aside as oppressive.

The substance of the transaction in the present case was that in consideration of a further advance the lender should get an additional 1 per cent. rate of interest, and should be allowed to charge agency fees. The land was not charged with the additional 1 per cent. interest. It was a transaction independent of the mortgages. There was nothing oppressive or inequitable in the

(1) I. R. 7 Eq. 467.
(2) [1896] 1 I. R. 56.
(3) 9 Ves. 254.
(4) I. R. 5 Eq. 583.
(5) L. R. 2 H. L. 1.
(6) I. R. 5 Eq. 225.
(7) 11 Ir. Ch. R. 367.

contract. In no case has a transaction of this kind been held to create a clog on the equity of redemption. In *Mainland* v. *Upjohn* (1) a collateral advantage was enforced, and *Broad* v. *Selfe* (2) and *James* v. *Kerr* (3) are distinguished, and the principle of the decision is approved of in *Biggs* v. *Hoddinott* (4). In the present case there was a stipulation for a further advance, the conditions were reasonable, and there was no fetter on the equity of redemption: *Santley* v. *Wilde* (5); *Carritt* v. *Bradley* (6).

In *Noakes* v. *Rice* (7) the tie on the mortgaged premises was intended to continue after the redemption of the mortgage. *Browne* v. *Ryan* (8) does not touch this case.

The very broad rule enunciated in the leading case of *Jennings* v. *Ward* (9) is no longer law. See observations of Romer, J., in *Biggs* v. *Hoddinott* (4).

As to receiver's fees: the stipulation was proposed by Maxwell himself. In *M'Kinley's Estate* (10) the case is distinguished from *Parkinson* v. *Hanbury* (11), on the grounds stated by Flanagan, J., p. 470. The principle of the latter case applies to the present one. *Comyns* v. *Comyns* (12) and *Chapple* v. *Mahon* (13) are distinguishable.

The question now raised is not open after this lapse of time. Our position has been altered. The delay indicates acquiescence.

Matthew J. Bourke, K.C., in reply:—

The rule that a mortgagee cannot under colour of a mortgage obtain an independent collateral advantage does not rest alone on the ground of usury, and the principle of decided cases remains unaffected by the repeal of the usury laws. In *Broad* v. *Selfe* (2) Lord Romilly decided this, and disallowed a commission for which a mortgagee had stipulated in addition to his principal and interest. To the same effect is *James* v. *Kerr* (3).

(1) 41 Ch. D. 126.
(2) 11 W. R. 1036; 9 Jur. (N. S.), [885.
(3) 40 Ch. D. 449.
(4) [1898] 2 Ch. 307.
(5) [1899] 2 Ch. 474.
(6) [1901] 2 K. B. 550. Since reversed by the House of Lords—[1903] A. C. 253.—[REP.]
(7) [1902] A. C. 24.
(8) [1901] 2 I. R. 653, 671.
(9) 2 Vern. 520.
(10) I. R. 7 Eq. 467.
(11) L. R. 2 H. L. 1.
(12) I. R. 5 Eq. 583.
(13) *Ibid.* 225.

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There has been no such delay as shows acquiescence. The mortgagor was ignorant of the facts and rights of his position: *Langstaffe* v. *Fenwick* (1).

July 11.

THE MASTER OF THE ROLLS:—

The questions arising in this case, so far as they are ripe for decision on the present hearing, are connected chiefly with the document of the 4th October, 1878, and are raised in the 7th paragraph of the statement of claim. It is as follows:—"At the date of the advance of £300, in the 6th paragraph hereof mentioned, the plaintiff, who was a Sub-Inspector of the Royal Irish Constabulary, was, as the said Nathaniel Tipping then well knew, in great distress owing to pecuniary difficulties, and in urgent need of the said advance. And the said Nathaniel Tipping, taking advantage of the plaintiff's position, induced him to execute an agreement in writing, dated the 4th day of October, 1878, whereby, after reciting the mortgages hereinbefore mentioned, and that the principal sum of £1800 was then due, and that the rental (£165) of the said lands was just sufficient to pay outgoings, and interest at the rate of £5 per cent., it was stipulated that, in consideration of the said sum of £300 then advanced, the plaintiff should pay out of his salary, or otherwise, an additional £1 per cent. so that the said Nathaniel Tipping should receive interest at the rate of £6 per cent. per annum on the whole £1800 charged on the said lands of Tattykeel, and that he should collect the rents thereof until the said sum of £1800 and interest thereon should be paid off, and should out of such rents pay outgoings and premiums and interest at the rate of £5 per cent. on the principal sum, and should retain the remainder of such rents as receiver's fees, and that the plaintiff should pay £18 per annum to the said Nathaniel Tipping, in twelve monthly instalments of £1 10*s.* each, to make the interest up to £6 per cent. as aforesaid. The plaintiff charges that the said Nathaniel Tipping, as mortgagee, in compelling him to execute this agreement, acted harshly and oppressively, and that he availed himself of the plaintiff's necessities to endeavour to obtain for himself as mortgagee additional and collateral

(1) 10 Ves. 404.

advantages. And the plaintiff submits that the terms of the said agreement were contrary to the policy of the law and void, and that it was unfair and unreasonable."

The 8th paragraph avers that the defendant Tipping entered upon the mortgaged lands as mortgagee.

The case made in the 7th paragraph is one of fraud, that is, abuse of fiduciary position, undue influence, and taking advantage of the plaintiff's great pecuniary distress, coupled with pressure amounting to coercion, and absence of legal advice. This would have been a difficult case to prove, having regard to the plaintiff's position as an officer of the Royal Irish Constabulary; but so far as any alleged wrongful acts of the defendant's father were concerned, Mr. Maxwell, when examined, negatived these, so far as he was asked about them; and Mr. Bourke dropped that part of the case (indeed expressly abandoned it), and relied simply on the agreement itself as being a clog or fetter on the equity of redemption in two respects, first, as raising the mortgage interest from 5 to 6 per cent., and second, as colourably empowering plaintiff to collect the rents and charge commission for so doing, thus rendering the redemption more onerous on the plaintiff than it ought to have been.

The agreement is in these words:—

1. The said Nathaniel Tipping shall collect and receive the rents of Tattykeel on the usual gale days until the whole sum of £1800 be paid off.

2. The said Nathaniel Tippping shall out of said rents pay all head-rent, tithe rentcharge, rates, taxes, and cesses, payable by the said George Maxwell in respect of said lands, and shall also pay the premiums on the policies of assurance aforementioned as the same shall accrue due, and shall deduct and retain thereout the yearly sum of £90 sterling, that is to say, interest at the rate of £5 per cent. per annum on the said sum of £1800 debt charged on said lands, and shall finally retain and appropriate the remainder of the rents of said lands as receiver's fees, and in payment for all trouble and expenses he may incur as agent and receiver of said lands.

3. The said George Maxwell shall make up the interest to be paid to the said Nathaniel Tipping to 6 per cent. per annum, the

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said Nathaniel Tipping receiving the yearly sum of £18 sterling, in twelve instalments of £1 10*s.* each, which he shall pay on the 1st of each month.

Prior to the agreement there was due to Tipping £300 principal on the mortgage of 1872, and £1200 on foot of that of 1875, transferred to Tipping in 1876; and the agreement of 4th October, 1878, was made on the occasion of a further advance of £300 secured by judgment mortgage charged on Tattykeel,

The agreement was proposed by Maxwell, in a document in his own writing now before me. This paper is drawn up by him, and commences with a calculation: on one side "£90 interest on £1800 at 5 per cent.; £40 on policy of insurance for £1500, with profits; £18 head-rent; £6 tithe rent and poor rates; £8 receiver's fees": totting up to £162 total charge on gross rental. On the other side £165 10*s.* is taken as the gross income; £162 for charges and deductions, leaving a balance of £3 10*s.* over. To £162 total charge on gross rental is added £18 increased charge, at 6 per cent., and the total is brought out correctly on the basis of that calculation as £180 against £165 10*s.* at 6 per cent. Then there is this:— "N.B. The sum of £1800 is secured at 5 per cent. by the rents, and £3 10*s.* to spare, which, taken with the arrears due, ought to be fair security. At 6 per cent. there will be a sum of £14 yearly to be paid over what the property can yield. This income is to be secured by the seventeen shares at my mother's death and my bond to pay by monthly instalments, failing which at any time the property can be sold without further notice, and a lien so obtained on the shares to cover principal and interest for the few pounds which might not be paid up by me, a very unlikely circumstance."

That document and the agreement of 4th October, 1878, are relied on as being within the authorities a clog on the equity of redemption; and having regard to the very recent decision of *Browne* v. *Ryan* (1), it would be mere affectation on my part to go through the catalogue of cases bearing on this subject. The judgment of Walker, L.J., contains all the law on the subject, and the case of *Noakes* v. *Rice* (2), in the House of Lords,

(1) [1901] 2 I. R. 653, 671. (2) [1902] A. C. 24.

adopted and followed the decision of the Irish Court of Appeal, so that it is quite unnecessary at present to refer at length to *Broad* v. *Selfe* (1), and *Biggs* v. *Hoddinott* (2), and a number of other cases. In *Broad* v. *Selfe* (1) the mortgagee was an auctioneer, and there was a stipulation at the time of the advances for liberty to sell and retain commission which was held void, although expenses were allowed. In *Noakes* v. *Rice* (3) there was a mortgage of a tied house, and it was so tied that after the mortgage had been paid off there would still be a condition attached to the premises which had been mortgaged, which rendered them incapable of being restored in the same condition as before. The whole gist of the argument in that case is contained in one line. Mr. Astbury, for the respondent, says :— "The property mortgaged was a free house ; it is to be reconveyed a tied house." That was the whole substance of the decision in the case, and Lord Halsbury, in coming to the conclusion that there was a clog on the equity of redemption, in his judgment refers mainly to *Browne* v. *Ryan* (4).

In the present case the distinction lies on the surface. In *Noakes* v. *Rice* (3) and the other cases the infirmity relied on as being a clog on the equity of redemption is found in the original transaction. Here that is not the case. On this question I refer to the judgment of Lord Davey in *Noakes* v. *Rice* (3). He says (p. 32) :—" My Lords, there are three doctrines of the Courts of Equity in this country which have been referred to in the course of the argument in this case. The first doctrine to which I refer is expressed in the maxim, 'Once a mortgage always a mortgage.' The second is that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract; and the third is that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void. My Lords, the first maxim presents no difficulty ; it is only another way of saying that a mortgage cannot be made irredeemable, and that a provision to that effect is void. In the case of *The Marquis of North-*

(1) 11 W. R. 1036 ; 9 Jur. (N. S.), 885.
(2) [1898] 2 Ch. 307.
(3) [1902] A. C. 24.
(4) [1901] 2 I. R. 653, 671.

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ampton v. *Salt* (1) the question was whether a certain life policy, the premiums on which were charged against the mortgagor, was comprised in the mortgage security. The question having been decided in the affirmative, it was declared to be redeemable, notwithstanding an express provision to the contrary contained in the deed. My Lords, the second doctrine to which I refer, namely, that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract, was established long ago when the usury laws were in force. The Court of Equity went beyond the usury laws, and set its face against every transaction which tended to usury. It, therefore, declared void every stipulation by a mortgagee for a collateral advantage, which made his total remuneration for the loan indirectly exceed the legal interest. I think it will be found that every case under this head of equity was decided either on this ground, or on the ground that the bargain was oppressive and unconscionable. The abolition of the usury laws has made an alteration in the view the Court should take on this subject, and I agree that a collateral advantage may now be stipulated for by a mortgagee, provided that no unfair advantage be taken by the mortgagee which would render it void or voidable, according to the general principles of equity, and provided that it does not offend against the third doctrine. On these grounds I think the case of *Biggs* v. *Hoddinott* (2) in the Court of Appeal was rightly decided. The third doctrine to which I have referred is really a corollary from the first, and might be expressed in this form: Once a mortgage always a mortgage, and nothing but a mortgage. The meaning of that is that the mortgagee shall not make any stipulation which will prevent a mortgagor who has paid principal, interest, and costs from getting back his mortgaged property in the condition in which he parted with it. I do not dissent from the opinion expressed by my noble and learned friend opposite (Lord Lindley) when Master of the Rolls, in the case of *Santley* v. *Wilde* (3). He says:—'A clog or fetter is something which is inconsistent with the idea of security; a clog or fetter is in the nature of a repugnant condition.' But I ask, 'security' for what? I think

(1) *Salt* v. *Marquis of Northampton*, [1892] A. C. 1.

(2) [1898] 2 Ch. 307.

(3) [1899] 2 Ch. 474.

it must be security for the principal, interest, and costs, and"—I draw attention to these words particularly—"and I will add, for any advantages in the nature of increased interest or remuneration for the loan which the mortgagee has validly stipulated for during the continuance of the mortgage."

Now, in the present case it is not contended that there was anything in the mortgages prior to October, 1878, which could amount to a clog. There was, in fact, nothing whatever unusual in them; and there was no circumstance connected with them which, if incorporated with the contracts, would have had any such effect.

But it is said that the agreement of October, 1878, had the effect of imposing a fetter on the equity of redemption, by increasing the rate of interest, and by making the mortgagee the agent to receive the rents of the lands, and empowering him to charge agency fees.

This agreement of 1878 forms no part of the original mortgage transaction. It may be, and I should think it is, the law that a contemporaneous agreement amounting, or alleged to amount, to a fetter upon redemption, will have the same effect as if it were contained in the mortgage itself; as was the case in *Biggs* v. *Hoddinott* (1), and most of the cases referred to. But that is not the case here. The agreement of 1878 was a new contract for a fresh consideration, being an advance of £300, which the lender would not have advanced except on the terms embodied in the contract, terms suggested and proposed by the borrower himself in his own handwriting. What is then to hinder a mortgagor from dealing with his equity of redemption as he pleases? He may mortgage it, transfer it, sever it, release it at his pleasure. He may make a valid contract to pay a higher rate of interest for his debt; so that, even if this independent agreement would, if part of the original transaction, have been an inadmissible restraint, it by no means follows that it was so in 1878, when Tipping parted with his additional £300. It would rather appear, however, that it would fall within the second head referred to by Lord Davey (viz. securing collateral advantage) than the third.

(1) [1898] 2 Ch. 307.

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As to the increased rate of interest, that is not a clog. (Lord Davey, *ubi supra.*) If, to avoid foreclosure, and being unable to pay at once, a mortgagor agrees to pay higher interest, that, apart from any question of oppression or the like, is no restraint on his right to redeem. On paying what he contracts to pay, he can have back his property exactly as it was: *a fortiori*, if he obtain a fresh advance in consideration of the increase. There is now, of course, no question of the usury laws to evade which many and various contrivances used to be resorted to.

The case, then, being stripped of all question of undue influence, unfairness, coercion, or oppression, comes to this:—Was it not legally possible for two grown men, each having legal advice, to come to a bargain that one of them, Tipping, being a creditor of the other on mortgages for £1500, should be appointed agent of the other over the mortgaged property, and entitled to charge agency fees, in consideration of giving a further advance of £300?

It remains to be considered, however, whether this is the effect of the agreement of 1878. That contract does not purport to impose *upon the land* any charge in respect of the 1 per cent. additional interest. On the contrary, clause (3) provides that "The said George Maxwell shall make up the interest to be paid to the said Nathaniel Tipping to 6 per cent. per annum, the said Nathaniel Tipping receiving the yearly sum of £18 sterling in twelve instalments of £1 10*s.* each, which he shall pay on the 1st of each month"; while clause (2) exhausts the application of the rents on the basis obviously of Mr. Maxwell's calculation. In my opinion, so far as the mortgages are concerned, the lands were only liable after the agreement as they were before; that is, the plaintiff could have redeemed the mortgages amounting to £1500 at 5 per cent., while the defendant would have retained his right to the additional £300, and the interest on it, together with the additional 1 per cent. on the £1500, not expressly as charges on the land, but by virtue of the personal covenant or contract. In other words, there is no clog on the equity of redemption.

But Mr. Bourke says that, if so, the receipt of 6 per cent. out of the lands was illegal, and the difference should be refunded. The answer is that the surplus rents over and above 5 per cent. were

the money of Maxwell, and could have been claimed by him, save so far as they are bound by his obligations under the contract of 1878. But he has never redeemed, and the rents were applied with his knowledge in discharge of his liabilities. If the money had been paid into his hands, he would have been bound to pay it all the same; for even if it was not a charge it was a debt.

As to the rate of interest, it is not (if that were the point) apparently high, having regard to the nature of the security; and so the question would seem to resolve itself into that of the agency fees.

In cases in which agency fees have been disallowed, as in *M'Kinley's Estate* (1), the ground has usually been that there was something in the nature of a device. A mortgagee in possession cannot, as such, charge agency fees. If, then, by a device he obtains possession under such circumstances that he is really mortgagee in possession, the agency fees, though contracted for, will be disallowed.

But I am not aware of any case in which, when the possession has been obtained not under the mortgage, nor in pursuance of any contemporaneous agreement, or as part of the same transaction, but under a new contract for a fresh advance of money which would not have been made save on the terms of having the additional security, the same result has followed. Here is a contract between people of full age, at arms' length, with legal advice. Tipping would not have given his money on any other terms. Maxwell was resident in the South of Ireland, Tipping in Tyrone, where the lands were. Maxwell would have had to employ some agent. Tipping said: "then make me agent so as to secure myself, and I will let you have this additional £300 on practically personal security," or rather, he agreed to Maxwell's proposal to that effect. That is what it comes to. If that be illegal, it must be so by reason of decisions I am not aware of, or principles which I do not appreciate. I am not disposed to strain any rule limiting personal freedom of contract in a case where any element of fraud or unfair dealing is absent.

In the view I take of the case, it is unnecessary to consider the

(1) I. R. 7 Eq. 467.

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question of delay as indicating acquiescence, more than to say that that defence is not met by cases, such as *Langstaffe* v. *Fenwick* (1), where the relation of solicitor and client subsisted between the parties.

The agency fees cannot be charged, and indeed are not claimed, after the death of Tipping.

Solicitors for the plaintiff: *Corker & Lewis.*
Solicitors for the defendant: *Dickie & Carson.*

R. W. L.

M. R. 1903. July 18.

IN RE DROGHEDA STEAMPACKET CO., LIMITED.

Company—Ordinary shares—Arrears of dividend—Claim by shareholder—Contract—Statute of Limitations.

Dividends on ordinary shares in a Company had been declared and became payable more than six and less than twenty years before the claims for them were made by the shareholders:—

Held, that the share certificates, as governed by the articles of association, constituted a specialty debt, and that consequently the arrears of dividend were recoverable after the lapse of six years.

APPLICATION under section 138 of the Companies Act, 1862, for an order declaring the dividend of Thomas Leonard statute barred.

It appeared from the affidavit of Laurence Donegan, one of the liquidators appointed in the voluntary winding up of the Drogheda Steam Packet Company, that the Company was originally constituted in 1846 under a deed of settlement. On 1st November, 1856, the Company was registered under the Joint Stock Companies Act of 1856, and in 1901 a new memorandum and articles of association were adopted, and were confirmed by an order of the Master of the Rolls on the 25th of July, 1901, and the Company was registered with the Registrar of Joint Stock Companies on the 21st of September, 1901.

(1) 10 Ves. 404.

The dividend of £18 15*s.* claimed by Thomas Leonard was portion of the dividend declared by the Company in January, 1885, and appeared to have been sent to Thomas Leonard by cheque or dividend warrant, and lost by him.

The right of Thomas Leonard as an ordinary shareholder in the Company to dividends was governed by clause 128 of the Articles of Association, which provided that "subject to the rights of the holders of shares created and issued under the provisions of Articles 47 and 48," which provided for the increase of capital by the creation of new shares, "the profits of the Company shall be divisible among the holders of the ordinary shares in proportion to the amount paid up on the shares held by them respectively. Provided, nevertheless, that where capital is paid up in advance of calls upon the footing that the same shall carry interest, such capital shall not, whilst carrying interest, confer a right to participate in profits."

Charles Dillon, for the liquidators:—

The claim of Thos. Leonard has become statute barred, as more than six years have elapsed since the declaration of the dividend. It was first stated in the judgment of Lord Justice Christian in *Smith* v. *Cork and Bandon Railway* (1) that the Company was not a trustee for the shareholder of the dividend which was declared, and this view was subsequently confirmed and adopted in *In re Severn and Wye and Severn Bridge Railway Co.* (2), and in *In re Cornwall Minerals Railway Co.* (3). When the relation of creditor and debtor is established between the shareholder and the Company the debt requires to be a specialty to extend the period beyond six years. Section 16 of the Companies Act of 1862 does not make the Articles of Association a contract under seal binding on the Company: *Eley* v. *Positive Government Security Life Assurance Company* (4), and *Baring Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (5).

(1) I. R. 5 Eq. 65.
(2) [1896] 1 Ch. 559.
(3) [1897] 2 Ch. 74.
(4) 1 Ex. D. 88.
(5) [1899] 2 Ch. 80.

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Macrory, for Mr. Thomas Leonard :—

The Articles of Association constitute a specialty contract between the Company and the shareholder, and are the charter of the Company as between it and the shareholders. We are entitled to a share, that is to an interest in the Company proportional to a sum subscribed subject to certain rights and liabilities which are regulated by the Articles of Association, and one right is that we shall be paid our dividend ; the Company have admitted our right to one share by the certificate which is under seal. The dividend is a mere adjunct to the share and goes with the share, and the certificate in admitting our right to the share admits our right to the dividend. The point now in question is absolutely ruled by *Smith* v. *Cork and Bandon Railway Company* (1), which decides that twenty years is the period of limitation applicable to the recovery of arrears of dividends. [He was stopped by the Court.]

THE MASTER OF THE ROLLS :—

In this case everything that could be said in support of his contention has been urged, and very well urged, by Mr. Dillon.

The liquidators of the company have brought the matter forward for the purpose of getting a decision of the Court as to what they should do in reference to arrears of dividend declared in respect of a share in the Company on 23rd January, 1885, that is, more than six years, and not yet twenty years, ago. The warrant or cheque appears to have been actually sent to the shareholder. The question is, whether any and what Statute of Limitations applies to the case. The share certificate confers a right to a portion of the property of the Company on a shareholder by reason of a contractual relation between the shareholder and the Company. Under the Articles of Association in this case there is power to increase the share capital (clauses 47 and 48). Subject to the rights of the holders of the shares created and issued under these provisions, clause 128 provides that "the profits of the Company shall be divisible among the holders of the ordinary shares in proportion to the amount paid up on the shares

(1) I. R. 5 Eq. 65.

held by them respectively. Provided, nevertheless, that where capital is paid up in advance of calls upon the footing that the same shall carry interest, such capital shall not, whilst carrying interest, confer a right to participate in the profits."

The present case is one of an ordinary shareholder. What is the right of an ordinary shareholder? It is, as to dividends, regulated by clause 128 of the Articles of Association. The right to the shares is evidenced by a certificate under the seal of the Company, and the certificate constitutes a specialty obligation, and such certificate incorporates the Articles of Association and gives the holder a right under a specialty contract to dividends. The deed of partnership contains a similar provision to that contained in clause 128 of the Articles of Association as to the division of profits. Then if the right to dividends depends on contract, what is the contract? It is a composite contract of a specialty nature, depending on the Articles of Association as incorporated with the certificate of shares issued to each shareholder, and by virtue of that he holds his shares under a specialty contract which imports the clause of the Articles of Association giving him a specialty right. It does not give him a right to dividends until, in the first place, the directors have taken and passed the accounts, and in the second place have declared the dividends; then the shareholder's right to the dividend is complete, and is in its nature a right created by specialty. Irrespective of decision, that is what I hold.

There have, however, been decisions in reference to this question. First, as regards ordinary shares in *Re Severn and Wye and Severn Bridge Railway Company* (1). That was a case (as I have said) dealing with ordinary shares. The dividends in question had been declared and became payable *more* than twenty years before the claims were made, and, therefore, the rights of the shareholder as regards the shares could not be kept alive except on the basis of the existence of the relation of trustee and *cestui que trust*, and the contest in the case was as to whether the directors of the Company were trustees for the shareholder. Romer, J., disposed of that contention by holding that the relation of trustee and *cestui que trust* did not exist, and founded

(1) [1896] 1 Ch. 559.

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his decision, to some extent at least, on *Smith* v. *Cork and Bandon Railway Company* (1), a decision of the Court of Appeal in this country, in which the judgment of Christian, L.J., is the leading one. That case, to which I shall again refer, shows that the obligation between Company and shareholder depends on contract and not on trust.

Re Cornwall Minerals Railway Company (2) was a case in which the claimant was a debenture holder, and holding by debenture of course he was a specialty creditor, and it was held that twenty years was the period of limitation which applied.

In what respect, then, is there a difference in principle between the case of a debenture holder and that of a shareholder who has got a contract under seal, when a dividend is declared and there is a fund available to pay him? Of course, debenture-holders have a priority, as creditors. But, coming back to *Smith* v. *Cork and Bandon Railway Company* (1), in my opinion it cannot be distinguished in principle from the present case, and governs it if it is a right decision, although it was a case not of ordinary but of preference shares. In a strong judgment delivered by Christian, L.J., in which (as sometimes happened) he expressed some fine scorn for the views of his colleagues on the Bench, his Lordship flouted the idea of the existence of any relation of trustee and *cestui que trust* between Company and shareholder; and said that the certificate was equivalent to a grant by the Company of a perpetual annuity to the shareholder. That observation must be received with a certain qualification, because there is only a right to a perpetual annuity if there are profits by which the annuity can be fed. But, at any rate, in that case he held that claims on preference shares were payable as a specialty debt.

Then, is there a distinction in the case of an ordinary shareholder? The dividends in each case are payable out of the same fund, but the preference shareholders come first. There is first an ascertainment of profits, and if there is a sufficiency of profits the preference shareholder gets the whole of his dividends. If there is not, he only gets a portion. But if there is more than enough to pay the preference shareholders, then the surplus becomes distributable among the ordinary shareholders. They are paid out

(1) I. R. 5 Eq. 65. (2) [1897] 2 Ch. 74.

of exactly the same profits, and in exactly the same way. If that is so, it would be a very curious result if, of two dividend warrants sent to a shareholder on the same day—one for preference, and one for ordinary, shares in the same form—and payable out of the same fund, one should be barred by non-payment of arrears after six years, and the other should not be barred till after the lapse of twenty years. That result can only be arrived at by clear words in the contract, which is embraced in the share certificate incorporating the deed of partnership and the Articles of Association.

In my opinion, there being a debt due to the shareholder when profits are declared, and there being a contract under seal, and therefore a specialty contract, the claim in this case is not barred.

Solicitors for the liquidators: *Hayes & Son.*
Solicitors for Thomas Leonard: *D. & T. Fitzgerald.*

R. W. L.

IN RE THE LEINSTER CONTRACT CORPORATION, LTD.

M. R. 1903. July 20.

Companies Acts—Insolvent Company—Secured and unsecured creditors—Priorities—Judgment creditor—Bankruptcy rule—Judicature Act, 1877 (40 & 41 *Vict. c.* 57), *sect.* 28, *sub-sect.* 1.

In the compulsory winding up of an insolvent Company in the Court of Chancery, under the Companies Acts, 1862 and 1867, the effect of section 28, sub-section 1, of the Judicature Act, 1877, is that the rules of bankruptcy as to secured and unsecured creditors shall prevail, and consequently judgment creditors of a Company in liquidation, who had taken no active steps to enforce their securities, are not entitled to be paid in priority to the ordinary creditors of the Company.

THE Leinster Contract Corporation (Limited) was being compulsorily wound up, under an order of the Right Hon. the Master of the Rolls, under the Companies Acts, and it appeared from the Chief Clerk's certificate that the assets of the Company were insufficient for the payment of its debts and liabilities and the costs of winding up.

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The opinion of the Judge was asked for by the liquidator on this question, viz. Whether the judgment creditors of the Company were entitled to be paid in priority to the ordinary creditors of the Company, or whether the judgment creditors and the ordinary creditors were entitled to be paid their respective debts in equal priority.

Jefferson, for the liquidator :—

The question arises on the construction of sect. 28, sub-sect. 1, of the Judicature Act, 1877. We contend that the bankruptcy rules have no application as regards the rights of creditors *inter se* : *Smith* v. *Morgan* (1); *In re Maggi*; *Winehouse* v. *Winehouse* (2); *Scott* v. *Murphy* (3). *Re Whitaker* (4) is a decision that in England the bankruptcy rule, that voluntary creditors are to be paid *pari passu* with those for value, should be applied in the administration of insolvent estates in the Chancery Division. That decision would seem to overrule the previous practice, so far as England is concerned, and to overrule the two cases of *Smith* v. *Morgan* (1), and *In re Maggi*; *Winehouse* v. *Winehouse* (2). The rule in Ireland has been so long in existence that this Court will not follow a mere practice decision in England, when it is at variance with the rule which has been adopted in this country for over a quarter of a century. *Moore* v. *Smith* (5) shows this, for the decision of our Court of Appeal is still followed in this country, although it is at variance with *In re Leng* (6), which was a decision of the English Court of Appeal, and is in direct conflict with *Moore* v. *Smith* (5). At any rate, in the winding-up of an insolvent company, judgment creditors are payable in priority to simple contract creditors : *In re Withernsea Brickworks Company* (7); *In re Richards* (8); Buckley on Companies, pp. 418, 419.

In the grammatical construction of sect. 28, sub-sect. 1, the judgment of Fry, J., *In re Maggi*; *Winehouse* v. *Winehouse* (2), was clearly right, and this was recognised in *Scott* v. *Murphy* (3), so that the existing practice is in harmony with the grammatical construction of the sub-section, and should not be departed from.

(1) 5 C. P. D. 337.
(2) 20 Ch. D. 545.
(3) 13 L. R. Ir. 10.
(4) [1901] 1 Ch. 9.
(5) [1895] 1 I. R. 512.
(6) [1895] 1 Ch. 652.
(7) 16 Ch. D. 337.
(8) 11 Ch. D. 676.

Joseph M. Day, for the judgment creditors:—

We adopt the argument of counsel for the liquidator. A judgment creditor is entitled to priority. Section 28 has not the effect of introducing the bankruptcy rule. The Irish decisions are clear on the question. The matter was decided in this Court in *Scott* v. *Murphy* (1), and that decision has been followed and affirmed in *Moore* v. *Smith* (2) in the Court of Appeal, where the matter is expressly ruled. The English decisions on the subject are not binding.

O'Connor, K.C., for unsecured creditors:—

The effect of sect. 28 of the Irish Judicature Act, 1877, is that in the winding up of an insolvent company in the Court of Chancery the rule in bankruptcy, that secured and unsecured creditors are to be paid *pari passu*, must prevail. There is really no conflict between the Irish and English decisions. *Moore* v. *Smith* (2) is a decision on the effect of sect. 3 of the Married Women's Property Act, 1882, and section 28 of the Act of 1877 was only incidentally the subject of consideration in reference to the conjoint operation of the two statutes. The decisions of *In re Maggi*; *Winehouse* v. *Winehouse* (3), and *Smith* v. *Morgan* (4), have been overruled by the Court of Appeal in *Re Whitaker* (5). The proper interpretation of sect. 10 of the English Act, and of sect. 28 of the Irish Act, is that they deal with the rights of the classes of secured and unsecured creditors *inter se*. That is the natural construction of the section: *In re Leng* (6). *Scott* v. *Murphy* (1) followed *In re Maggi*; *Winehouse* v. *Winehouse* (3) and *Smith* v. *Morgan* (4), which are now no longer law. We submit the Court should adopt the principle of *Re Whitaker* (5) and *In re Leng* (6) in dealing with this case.

THE MASTER OF THE ROLLS:—

The requisition in this case is for the opinion of the Judge as to "whether the judgment creditors of this Company are

(1) 13 L. R. Ir. 10.
(2) [1895] 1 I. R. 512.
(3) 20 Ch. D. 545.
(4) 5 C. P. D. 337.
(5) [1901] 1 Ch. 9.
(6) [1895] 1 Ch. 652.

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entitled to be paid in priority to the ordinary creditors of the said Company, or whether the said judgment creditors and the said ordinary creditors are entitled to be paid their respective debts in equal priority."

It will be observed that the question submitted for decision is a net one in reference to judgment creditors as a body and class, and that there is no distinction drawn between different classes of judgment creditors, as, for instance, those who have issued execution or seized under execution and the like. The net question is whether a judgment creditor is entitled to priority. It might no doubt be more convenient if particulars of the securities of the several judgment creditors were given, but I treat it as an application on behalf of all judgment creditors, and therefore I do not decline to give a decision on the point argued before me.

The Company is being wound up, and a liquidator has been appointed, and the question is simply as to the effect of section 28 of the Judicature Act of 1877, in reference to procedure and practice in Chancery and in the Court of Bankruptcy. The section provides :—

"In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any Company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, &c., as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt in Ireland."

Now, it was early held that the section of the English Act, as far as creditors were concerned, was not intended to apply to the rights of secured creditors or unsecured creditors *inter se*, but that the matter dealt with was the rights of secured creditors as a class and the rights of unsecured creditors as a class ; and in *In re Maggi* (1) it was decided that that was the construction of the

(1) 29 Ch. D. 545.

Act, and that therefore, where there is a class of creditors by judgment and some others have provable debts, but have not recovered judgment, the judgment creditors are entitled to be paid in priority out of the assets, and that decision was treated as a correct interpretation of the Act for a number of years, and was regarded as a sort of legal axiom.

The question arises in this way. In bankruptcy in the distribution of assets the old practice was for judgment creditor and simple contract creditor to be treated on the same footing; but in Chancery in the administration of assets of deceased persons a contrary rule has prevailed. Judgment creditors are preferred to simple contract creditors, and the assets are distributable, first, among judgment creditors, and secondly, among simple contract creditors, and the argument in this case was that under the 28th section, no matter what the rule was, as to distribution in the administration of the estate of a deceased person in Chancery, in the case of a winding up the rule in bankruptcy must prevail.

There was a difference in practice between this country and England. *Moore* v. *Smith* (1) in this country was decided about the same time as the decision of *In re Leng* (2) in the English Court of Appeal. I am not, however, embarrassed by this circumstance, because if it be the fact that the interpretation of the statute has been altered by the Court of Appeal in England, in *Whitaker's Case* (3), neither of the previous cases in England can be regarded as law. It has been suggested that I ought to follow the decision in this country, but in a case where the statutes are the same I think I am at liberty to consider what the Court of Appeal in this country would do if a similar case to *Whitaker's* (3) were now to come before them, and I conceive myself bound to do as I think they would, having to choose between conflicting decisions.

Whitaker's Case (3) was not the case of a contest between a judgment creditor and a simple contract creditor. It was a case in reference to the operation of the rules in bankruptcy as to the rights of a voluntary creditor and a creditor for value in the

(1) [1895] 1 I. R. 512. (2) [1895] 1 Ch. 652. (3) [1901] 1 Ch. 9.

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administration of the estate of a deceased insolvent by the Court of Chancery, and it established the practice that the rule in bankruptcy is to be introduced into the administration of estates of deceased insolvents by the Chancery Division.

There was a similar, though not the same, controversy in the case as the one now before me.

In *Whitaker's Case* (1) the Court, in terms as strong as I have ever seen where it was dealing with a decision previously regarded as clear law, overruled *Smith* v. *Morgan* (2) and *In re Maggi* (3). Rigby, L.J., says :—" The question is, whether in the administration of an insolvent estate in the Chancery Division the old and undoubted rule of the Court of Chancery, that creditors for valuable consideration took precedence over those whose debts were not founded upon a valuable consideration, must, notwithstanding sect. 10 of the Judicature Act, 1875, still prevail. In my opinion we cannot so hold. Section 10 provides (among other things) that the rules for the time being in force in bankruptcy as to debts provable shall apply in the administration by the High Court of the estate of a deceased insolvent. Upon the true construction of the words I think they do not simply deal with the proof of debts. The same rules are to prevail 'as to debts and liabilities provable.'

" I cannot read those words as meaning simply 'as to the proof of debts and liabilities.' I think they mean that whatever general rules are in force in the Court of Bankruptcy for the time being with regard to debts and liabilities provable, shall apply in the administration of insolvent estates in Chancery. Now, undoubtedly in bankruptcy (it does not matter how it came about) the rule as to debts and liabilities provable is that all those debts and liabilities, whether contracted for value or not, shall rank *pari passu*. I think we should be cutting down unduly the plain words of sect. 10 if we were to allow the old rule of the Court of Chancery to override in the present case the existing rule in regard to bankruptcy. If ever that rule should be altered, it would of course be a different matter. I do not suggest that it ought to be altered, but it is now a fixed rule that voluntary debts shall be on an equality with debts for value. If this view conflicts with the decisions in *Smith* v. *Morgan* (2) and *In re Maggi* (3), I can only

(1) [1901] 1 Ch. 9. (2) 5 C. P. D. 337. (3) 20 Ch. D. 545.

say that we are not bound by those decisions, and if and so far as it is necessary (which probably means altogether), we must overrule them." And Vaughan Williams, L.J., says:—"I agree. I do not think that sect. 10 is very artistically drawn, or that it is very easy to construe. Perhaps that is the reason why the decisions in the section are not very easy to reconcile. Speaking for myself, I should have thought that the decision of the Court of Appeal in *In re Leng* (1) was absolutely inconsistent with the decision of Fry, J., in *In re Maggi* (2). But Lindley, L.J., in his judgment in *In re Leng* (1), seems expressly to take the view that the two decisions are reconcileable, though I do not quite understand it. One thing is quite clear, namely, that the section does not mean that in all respects the results of a bankruptcy and the consequent administration of the estate, and the results of the death of an insolvent and the consequent administration of his estate, are to be absolutely identical. It was long ago decided that, notwithstanding sect. 10, you must still apply only in bankruptcy those bankruptcy rules, whether statutory or otherwise, which go to augment the bankrupt's assets as against third persons." He refers to the words of the section and agrees in the conclusion arrived at by Rigby, L.J. And Romer, L.J., says:—"I also agree. The important words in sect. 10 for the purposes of this appeal are, I think, those which provide that the bankruptcy rules 'as to the debts and liabilities provable' shall prevail in the administration of an insolvent estate by the High Court. The section does not say that only the rules as to what debts and liabilities shall be provable are to prevail; it speaks of all rules 'as to debts and liabilities provable.' It appears to me that if there be a rule in bankruptcy that a debt shall be provable, but only in an inferior position to ordinary debts, that would be a rule 'as to' that provable debt within the meaning of the section. And so if there be a rule in bankruptcy that certain debts shall be provable, but in a superior position. And equally, to my mind, if the rule in bankruptcy be that certain debts and liabilities are provable in no superior or inferior position to ordinary debts, but *pari passu* with them, that

(1) [1895] 1 Ch. 652. (2) 20 Ch. D. 545.

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would be a rule 'as to' those debts, This has, I think, been decided in principle by the Court of Appeal in *In re Leng* (1), and in my opinion that case cannot properly be distinguished in the way which has been suggested on the present appeal. *In re Maggi* (2) can, I think, no longer be regarded as an authority. The attention of Fry, J., when he decided that case was not directed to, and he did not in his judgment deal with, those words of sect. 10 which formed the basis of the decision in *In re Leng* (1), and which form the basis of our present decision."

The result was that the appeal was dismissed with costs, the Court holding that the effect of sect. 10 of the Judicature Act of 1875 was to introduce into the administration of the estates of deceased insolvents by the Chancery Division the rule in bankruptcy that voluntary creditors were to be paid *pari passu* with creditors for value.

The question then is, can I abstain from applying that principle of decision to a winding up case like the present, which is not complicated by the fact of there being any fixed practice in the matter, as I have not been referred to the existence of any rule in the case of liquidations, nor do these matters very often come before the Court in the present form? What the practice is I cannot say. I have not (as I have already said) before me any different classes of judgment creditors such as have issued execution or lodged writs with the sheriff, and there is no question placed before me for determination as to their respective rights. Still less is there a question such as was raised and decided in *Re Withernsea Brickworks* (3), where it was held that a judgment creditor had priority, because that was a case where a judgment creditor had issued execution and lodged with the sheriff, and he had seized. The decision was expressly founded on this, that that circumstance made him a secured creditor, and that section 10 (or section 28 of our Act) was not intended to apply. There is another matter I wish, in deciding this case, to guard against. I do not decide any question as to the administration of the assets of a deceased insolvent in the Chancery Division. That question might seem to be involved in this decision; but the prac-

(1) [1895] 1 Ch. 652. (2) 20 Ch. D. 545. (3) 16 Ch. D. 337.

tice seems to be uniform since the Judicature Act in the Chancery Division, in this country, to pay off judgment debts in priority to simple contract debts, and the certificate on which the Court acts in the allocation of assets distinguishes between judgment creditors and ordinary creditors. There may be different considerations applicable to it. I do not determine it till it arises.

Solicitors for the liquidator: *Carruthers & Gamble.*
Solicitors for the judgment creditors: *Hayes & Son.*
Solicitors for the unsecured creditors: *Hardman & Son.*

R. W. L.

IN THE MATTER OF THE ESTATE OF ROBERT ALEXANDER OGILBY, DECEASED; COCHRANE *v.* OGILBY.

(1903. No. 625.)

Will—Legacy—"Domestic servant," meaning of.

A testator bequeathed to each domestic servant in his service at his death who should have been in his service for ten years or upwards the amount of two years' wages.

The plaintiff was for over ten years in the testator's service as laundress, and received £60 a year, paid quarterly. She worked in a laundry in a yard adjoining the testator's house, but supplied her own food, and slept in a house of her own some distance away:—

Held, that she was not a "domestic servant" within the meaning of the bequest.

Ogle v. *Morgan* (1 De G. M. & G. 359) followed.

SUMMONS.

This was an application by Jane Cochrane of Scriggan, Dungiven, in the county of Londonderry, as a legatee under the will of Robert Alexander Ogilby, late of Pellipar House, in the said county, for an order that she might be declared entitled as a domestic servant to a legacy of two years' wages under the said will, and for paymont of the amount of the said legacy with interest thereon; and (2) that, if necessary, the personal estate of the testator should be administered. The defendants were the

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executors of the testator, whose will was made on April 10th, 1901, and proved by them on June 4th, 1902, his death having taken place on April 14th, 1902, at Pellipar House, Dungiven, in the said county, where he resided. The bequest under which the plaintiff claimed was as follows :—"I bequeath to each domestic servant who shall be in my service at my decease, and who shall have been in such service for ten years or more, if for less than ten years the amount of one year's wages, and if for ten years, or upwards, the amount of two years' wages, such legacies to servants to be paid free of legacy duty, and in addition to what sum may be due to the legatees at my decease for wages."

The plaintiff was laundress at Pellipar House, and was engaged by the testator's wife in the year 1890, and remained in the testator's service until the date of his death in 1902. The laundry where the plaintiff worked was in the yard at Pellipar House, near the kitchen, but had no internal connexion with the dwelling-house; her wages were £60 a year, and were paid quarterly by the testator or his wife in the same way as the servants who lived in the house, whereas the outdoor servants were paid weekly by the land-steward. She worked in the laundry during the day, and provided her own food. She had no duties in the house. She was a widow with one child, and lived in a house a mile and a half away, for which she paid a weekly sum of 1*s.* 6*d.* to the testator. She was engaged at the laundry during the day usually till 6 p.m., but sometimes as late as 8.30 p.m. The executors refused to pay her the legacy on the ground that she was not a "domestic servant."

Chadwick, for the plaintiff :—

The plaintiff was a domestic servant; her duties were domestic and brought her into personal relationship with her mistress; and that should be the test. The fact that she did not live in the house makes no difference. In *Townshend* v. *Windham* (1) a legacy by a testator to such of his servants as should be living with him at the time of his death was held not to be limited to such servants as lived in the testator's house, or had

(1) 2 Vern. 546.

diet from him. In *Pearce* v. *Lansdowne* (1), a case under the Employers' Liability Act, it was held that a potman at a public-house, who slept and had his meals elsewhere, was a "domestic or menial servant," and therefore excluded from the Act.

C. W. R. Brady, for the executors :—

The plaintiff was a servant, but not a domestic servant, as she did not live in the house. In *Ogle* v. *Morgan* (2) it was held that a gardener working outside, and not dieted by the testator, was not a servant in his "domestic establishment." Lord Truro there says that the word "domestic" was introduced into the will to distinguish between servants in the house not receiving board wages, and servants not boarding in the house and receiving proportionally higher wages. *Ogle* v. *Morgan* (2) was followed in *Vaughan* v. *Booth* (3), where a gardener living in a cottage in the garden was held not to be entitled to a legacy as "a domestic servant of the testator living with him or in his service at the time of his death." So also in *Re Drax*, *Savile* v. *Yeatman* (4), it was held that "household" servants had the same meaning as "domestic" servants, and that a coachman and groom who did not board in the testator's house were not included in the gift to each of his "household servants."

Chadwick, in reply :—

A gardener is in a different position from a laundry maid; her duties were domestic, and she was paid her wages in the same way as the servants who lived in the house.

THE MASTER OF THE ROLLS :—

Apart from authority, I confess I should have entertained no doubt that the plaintiff here comes within the terms of the bequest in the will in favour of "each domestic servant" of the testator in his service at the time of his death. Her duties as laundress were essentially domestic, and had no connexion with anything outside the house. Again, though the laundry where she worked was in a way

(1) 69 L. T. 316.
(2) 1 De G. M. & G. 359.
(3) 16 Jur. 808.
(4) 57 L. T. 475.

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separate from the rest of the house, it was part of the same range of buildings, and it was only for convenience that she worked there. The laundry was in immediate contiguity with the kitchen, and both opened into the same yard. The circumstance that Jane Cochrane slept away in another place was a matter of convenience also, and would not, I should have thought, alter her position as a domestic servant. She was paid her wages in the same way as the other domestic servants, and she worked in the laundry all day, and up to half-past eight in the evening sometimes. There can be no doubt that her wages, which were at the rate of £60 a year, were fixed, having regard to the fact that she was to support herself. She lived in a house 1½ miles distant from the testator, for which she paid the weekly rent of 1*s.* 6*d.* If she comes within the terms of the legacy to each domestic servant, she will be entitled to receive a larger sum than domestic servants living in the house; but for myself I do not attach coercive importance to that, as the testator could have provided for that in his will. It comes round to the question whether her position was that of a domestic servant; in other words, was she a member of the household? The observations of Lord Truro in *Ogle* v. *Morgan* (1) must be a guide in arriving at a conclusion on the meaning of the bequest here, although that case was somewhat different. The legacy there was to each person in the testator's "domestic establishment," and the claimant was a head gardener who lived outside, and never came into the house at all. It was held that he was not a member of the domestic establishment. I think that there are some cases where a gardener has been held to be a domestic servant for the purpose of a notice of dismissal: see *Nowlan* v. *Ablett* (2), cited in *Ogle* v. *Morgan* (1). In *Vaughan* v. *Booth* (3) the gift was to each of his domestic servants in his service at the time of his death. Lord Romilly held that *Ogle* v. *Morgan* (1) was undistinguishable, and that a gardener who did not live in the house, but in a cottage in the garden, was not entitled.

In *Re Drax, Savile* v. *Yeatman* (4), the gift was to the "house-

(1) 1 De G. M. & G. 359.
(2) 2 C. M. & R. 54.
(3) 16 Jur. 808.
(4) 57 L. T. 475.

hold servants," and the claimants were a coachman and two grooms who lived outside and received board wages. It was held there that "household" was the same as "domestic," and, following *Ogle* v *Morgan* (1), that the coachman and the groom, who did not board in the house, were not included in the gift. These cases may have been perfectly well decided, and yet the plaintiff here may be entitled. I cannot, however, decide this case merely on the nature of the duties. In *Ogle* v. *Morgan* (1) Lord Truro says:—"For the purpose of ascertaining in what sense the testator used the expression 'domestic establishment,' it appears to me to be important to distinguish between a servant in the establishment and one out of the establishment, between what is called an indoor and an outdoor servant. I cannot but think that the testator had this very distinction in view." He then refers to some cases for the purpose of distinguishing them, and continues: "In my opinion the word was introduced for the purpose of drawing a distinction between servants who were in the house not receiving board wages, and servants not boarding in the house and receiving proportionally higher wages; otherwise, by including an outdoor servant on board wages you would be giving him a vast deal more than those servants who were unquestionably within the scope and operation of the testator's bounty. The decree of the Vice-Chancellor must, therefore, be reversed." I should have thought that it was a matter for the testator to distinguish between the two classes of domestic servants, those sleeping in the house, and those sleeping outside the house and receiving board wages; and besides, no particular difficulty could arise due to the larger money wages which the plaintiff was receiving, for an inquiry could most easily ascertain how much of the money wages was given in lieu of the board and lodging received by the other domestic servants, the balance being the wages intended as the measure of the legacy. I cannot quite bring my mind to believe that the testator meant to exclude this laundress from his kindly bounty. I am not sure that Mr. Ogilby had any domestic servants if the plaintiff was not one. It is impossible, however, to take this case out of the principle laid

(1) 1 De G. M. & G. 359.

M. R. 1903. COCHRANE v. OGILBY.

down in *Ogle* v. *Morgan* (1), which was followed in the two cases to which I have referred. It is, therefore, with regret that I feel compelled to decide against the plaintiff's claim, for I am not sure that I am not defeating a lawful intention of the testator, a man of great wealth. The present proceeding has, however, saved the estate the expense of an administration, so I think I may give the plaintiff her costs, though deciding against her claim.

Solicitors for the plaintiff: *Martin, King, French & Ingram.*
Solicitors for the defendants: *B. H. Lane & Co.*

W. L.

H. L. 1903. Nov. 9, 10.

HARRISON, APPELLANT; KIRK, RESPONDENT.

Administration—Secured creditor—Proof against real estate—Application to prove against personal estate—Lapse of time—Funds in Court.

APPEAL by Henry Harrison from the judgment of the Court of Appeal—[1903] 1 I. R. 1, *sub nom. Beattie* v. *Cordner.*

The appellant appeared in person.

Haldane, K.C. (English Bar), *Ronan, K.C.*, and *William Whitaker*, for the defendants.

THE HOUSE OF LORDS (Earl of Halsbury, L.C., and Lords Davey, Shand, and Robertson) affirmed the decision of the Court of Appeal with costs (2).

Solicitors, *Denton, Hall & Burgin*, for *V. B. Dillon & Co.*; and *Arber & Lewis*, for *H. Wallace & Co.*

(1) 1 De G. M. & G. 359.
(2) *Ex relatione* Mr. Whitaker. W. N., 21 Nov., 1903, p. 190.

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ABSOLUTE GIFT—*Will—Executory trust—Direction to settle—Possibility of issue.*] A testator bequeathed *inter alia* two legacies of £300 to Mary *M.* and Elizabeth *M.* respectively, for their own sole and separate use, free from the control of any husband they might marry; said legacies not to be payable by the trustees and executors of his will until a settlement, to be approved of by them, should be made in reference to same. The testator died in 1866. The legatees never married, and had attained the ages of seventy-five and seventy years respectively. No settlement had ever been executed, and the money was retained in the hands of the trustees:—*Held*, that, under the circumstances, the legatees were entitled to have the legacies paid over to them by the trustees without any settlement. *In re Jordan's Trusts* - - - - - - V.-C. 119

2.—— *Will—"Survivors"—Life estate—Absolute gift—Restriction as to mode of enjoyment—Settlement.*] A testator bequeathed to each of his four unmarried daughters £10,000 New 3½ per cent. Government Stock, to be paid on marriage; and £20,000 Old 3½ per cent. Government Stock, to be settled on marriage strictly on each daughter, and on her demise on her lawful issue; and in case any of his four daughters should die without leaving lawful issue, who should attain the age of twenty-one or get married, then her £20,000 Old 3½ per cent. Stock was to be divided between the survivors of his four daughters. The longest liver of the four daughters was a widow, aged eighty-one, without children. On her marriage a settlement was executed, the ultimate limitation of which was to the persons who, by virtue of the will, should be entitled to the same:—*Held*, that, in the events which had happened, she was absolutely entitled to the £20,000 Stock bequeathed by her father's will and put in settlement on her marriage. *Olphert* v. *Olphert* - - - - - - M. R. 326

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ADMINISTRATION ACTION — *Practice—Secured creditor—Proof against real estate—Lapse of time—Application to prove against personal estate—Funds in Court.*] In an action for the administration of assets the primary decree had been made on the 26th July, 1888. A mortgagee on portion of the real estate proved his debt against the realty alone on the 13th February, 1889. In May, 1890, leave was given by the Court to present a petition to the Land Judge for sale of the real estate, including the lands comprised in the mortgage. The order for sale was made by the Land Judge, and a receiver was appointed. At the time that the mortgagee proved against the real estate it was believed that the proceeds of sale of the realty would be sufficient to pay the mortgagee. Subsequently the security became depreciated owing to circumstances beyond the control of the mortgagee and was insufficient for payment of incumbrances. Some simple contract creditors had proved against the personal estate, but there was more than enough money in Court to pay their debts. On the 9th June, 1902, the mortgagee applied for leave to prove against the personal estate the amount of his mortgage debt and interest:—*Held*, by the Court of Appeal (reversing the order of Porter, M.R.), that the money being still in Court, the mortgagee was entitled to prove against the personal estate so long as the rights of the other creditors who had already proved against the personalty were not affected. *Beattie* v. *Cordner*, M. R. 1; APP. 10; Judgment of Court of Appeal affirmed *sub. nom. Harrison, Appellant*; *Kirk, Respondent* - - - - H. L. 530

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ADVANCEMENT — *Heir-at-law—Assignment—Settlement — Marriage — Consideration—Distribution of assets—Hotchpot—Statute of Distributions* (7 *Wm.* 3, *c.* 6), *s.* 2.] *D.* was possessed of a farm of land held under lease *pur autre vie*. By deed, executed on the marriage of his son *J.*, in consideration of the marriage and of £600 paid to him by the father of the intended wife, *D.* assigned the farm and certain stock and chattels to *J.* *D.* died intestate, leaving *J.*, his eldest son and heir-at-law, surviving:—*Held*, that the farm was exempt

ADVANCEMENT—*continued.*
from being brought into hotchpot in the distribution of assets, on the ground that the assignment of it was an advancement of "land" to the heir-at-law, but that the stock and chattels transferred to him by the deed must be brought into hotchpot, as being simply an advancement of personal estate. *In re Lyons*; *Lyons* v. *Lyons* - M. R. 156

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AMBIGUITY — *Will — Construction — Specific bequest—Insufficient description—Legatee—Right of selection.*] A testator by will bequeathed "twenty Northern Bank shares" to a legatee. At the date of his death the testator was possessed of fifty-one "A" Northern Bank shares of the value of £26 each, and seventy-two "B" Northern Bank shares of the value of £13 each:—*Held*, that the legatee was entitled to select twenty of the "A" shares as constituting her legacy. *O'Donnell* v. *Welsh* [M. R. 115

ANNUITY — *Will — Construction — Annuities, whether for life or perpetual.*] A testator devised all his property to his two sons William and Thomas Ward equally. Portion of his property, which he specified, he charged item by item with certain annuities. He also gave to his said two sons all other unmentioned property of his. The will contained the following direction:—"My two sons Thomas and William are to pay out my property as follows: to pay to my wife yearly during her life £18 4*s.*; to my daughter Mrs. O'Neill yearly £36 8*s.*; to my son Tim Ward yearly £18 4*s.*; to said William Ward's eldest son yearly £3 12*s.*" The testator then directed that after the death of his wife her annuity was to be equally divided between Thomas and William and Tim Ward and Mrs. O'Neill, and that after the decease of Mrs. O'Neill her annuity was to be divided equally between her surviving children. Should Tim Ward not come home or die without issue, his annuity was to be divided equally "on the surviving families, viz. Mrs. O'Neill, Thomas, William, and mother":—*Held*, that the annuities were for the lives of the annuitants only, and not perpetual. *Ward* v. *Ward* - - - - - - V.-C. 211

APPROPRIATION — *Payments — Marshalling securities—Voluntary deed.*] Lands were subject to incumbrances ranking in priority as follows: (*a*) mortgage for £2000, vested in *A.*; (*b*) £1500 portions for the younger children of the owner; (*c*) mortgage for £1000 vested in *A.*; (*a*) and (*c*) were collateral securities for a larger mortgage debt of £4000. The charge (*b*) was created by a voluntary postnuptial deed which contained no covenants for title. By deed made between the owner, his eldest son, and trustees, to which *A.* was not party, certain policies of insurance were assigned in trust to pay the proceeds when realized in discharge of (*a*) and (*c*), described in the deed as "£3000 part of said sum of £4000," so as to relieve the inheritance of the lands. The amount secured by some of the policies having been received by the trustees, they paid £1000 thereout to *A.* on account of his demand, without any express appropriation. Six months afterwards *A.* appropriated this sum to payment of (*c*), which would not be reached by sale of the estate:—*Held*, 1, that *A.* was entitled to make such appropriation; 2, that the younger children of the owner were not entitled to marshal the securities against *A.* *In re Lysaght's Estate*; *Leatham, Petitioner* - - - Ross, J. 235

2. —— *Payments—Right to appropriate—Intention of creditor.*] *A* mortgaged his lands of *B* to secure £500. After his death this mortgage was assigned to the S. Insurance Company. His widow was a party to the assignment, and covenanted to pay the mortgage debt and interest. Under *A's* will the lands of *B* were devised in trust for sale for payment of legacies. His widow raised these legacies from the S. Insurance Company by several mortgages, and she personally covenanted to pay the principal and interest thereon. She died, and her estate, which was insolvent, was administered in the Court of Chancery. The N. B. and M. Insurance Company, in whom the interest of the S. Insurance Company was vested, proved for the entire of the mortgage debts, under the personal covenants, and received several dividends thereon. The lands of *B* were sold in the Land Judge's Court. The N. B. and M. Insurance Company claimed the right to appropriate these dividends towards the subsequent mortgages, and to be paid the entire of the £500 out of the proceeds of the sale of the lands:—*Held*, that, as they had proved in the action for the £500, they could not appropriate. *In re Browne's Estate* - Ross, J. 245

ARBITRATOR—Refusal to appoint—Superior interest—Redemption - 137, 141
See LAND LAW (IRELAND) ACTS. 1.

ASSIGNMENT — Equitable — After acquired property - - - - 449, 465
See MORTGAGE. 2.

—— Fee-farm grant — Increased rent—Redemption - - - - - - 250
See LAND LAW (IRELAND) ACTS. 3.

ASSIGNMENT—*continued.*
—— Fee farm grant — Liability on covenants *See* EXECUTOR. 2. [150
AUCTIONEER—Authority to sell crops—Valuable consideration - - 449, 465
See MORTGAGE. 2.
BANKRUPTCY RULE—Insolvent Company *See* WINDING UP. [517
BEQUEST.
See LEGACY.
BILL OF SALE—Authority to sell future crops *See* MORTGAGE. 2. [449, 465
BONA FIDE OCCUPATION—Redemption of rent - - - - - - 58
See REDEMPTION OF RENT.
BOND—Joint and several—Release of one of several co-debtors - - - 172
See JOINT DEBTORS.
BUILDING LEASE—Settled Land Act, 1882, section 10, sub-sect. 2 - - 154
See SETTLED LAND. 1.
CASES:—
—— *Jones* v. *Southall* (32 Beav. 31) followed and approved - - - - - - 179
See EXECUTION OF POWER. 1.
—— *Kennedy's Estate, In re* ([1902] 1 I. R. 364), form of order varied where incumbrancers not paid in full - - - - - 142
See LAND LAW (IRELAND) ACTS. 2.
—— *Lloyd* v. *Lloyd* ([1903] 1 Ch. 385) distinguished - - - - - - 348
See INTEREST.
—— *Nelson* v. *Headfort* (18 L. R. Ir. 407) distinguished - - - - - - 58
See REDEMPTION OF RENT.
—— *Nevill, In re* (59 L. J. Ch. 511), considered and followed - - - - - 489
See LOCKE KING'S ACT.
—— *O'Connor and Small's Contract* (33 Ir. L.T. R. 43) overruled - - - - - 412
See LEASE.
—— *Ogle* v. *Morgan* (1 De G. M. & G. 359) followed - - - - - - 525
See DOMESTIC SERVANT.
—— *Shelley's Case* (1 Rep. 93*b*), rule in, applied
See ESTATE TAIL. [215
—— *Whitley* v. *Whitley* (31 Beav. 173) distinguished - - - - - - 185
See ELECTION.
—— *Wright and Tittle's Contract, In re* (29 L. R. Ir. 111), principle of, applied - - 363
See LAND LAW (IRELAND) ACTS. 4.
CHARGE ON LAND—Settlement of—Judgment—Re-registration—Priority - 338
See JUDGMENT.
CHARGING ORDER—*Practice—Petition for a charging order under the Legal Practitioners (Ireland) Act, 1876.*] Where a solicitor, employed on behalf of the owner of an estate for sale in the Land Judge's Court, claimed to have preserved the property, and the estate was subsequently taken out of Court, and the owner refused to pay the costs incurred by his solicitor, the Land Judge allowed a petition by the solicitor under the Legal Practitioners (Ireland) Act, 1876, to be received and filed. *In re Burton's Estate*; *Moore, Petitioner* [Ross, J. 124
CHARITY—*Trust—Charitable purpose, for the repose of souls—Selection by legatee—Masses—Uncertainty.*] A testator bequeathed the residue of his estate to the Roman Catholic Archbishop of Dublin for the time being, "to be applied by him in such charities as he shall select for the repose of the souls of myself, my wife, and my parents":—*Held*, a valid charitable gift and not void for uncertainty. *Richardson* v. *Murphy* - M. R. 227; [APP. 234
—— Secret trust—Failure—Tenants in common *See* SECRET TRUST. 2. [73, 79
CLASS—Gift to—Will—Construction . 121
See PERSONA DESIGNATA.
CLOG—On equity of redemption - - 498
See MORTGAGE. 3.
COMPANY— Shares — Arrears of dividend — Amount recoverable - - - 512
See LIMITATIONS, STATUTE OF.
—— Winding up—Secured and unsecured creditors —Insolvency—Priority—Judicature Act, sect. 28, sub-sect. 1 - - - 517
See WINDING UP.
COMPENSATION—*Vendor and purchaser—Sale by Court—Damage to property after sale—Claim for compensation after conveyance.*] A purchaser of house property sold by auction by order of the Court, and in possession of a caretaker appointed by the receiver, complained in his requisitions on title of damage to the premises after the sale, and claimed compensation. He afterwards got possession, and accepted a conveyance on a subsequent date, but did not withdraw his claim for compensation:—*Held*, that the acceptance of a conveyance was not, in the circumstances of the case, a bar to the claim for compensation, and that as proper care had not been taken of the premises by the receiver between the date of the sale and the time when the purchaser took possession, the purchaser was entitled to compensation. *Connolly* v. *Keating* (No. 2) [M. R. 356
COMPULSORY PURCHASE—*Costs—Defence Acts—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 80, 82—*Payment of duty.*] The War Department, for the purpose of erecting defence works on Bear Island, in Bantry Bay, took by compulsory proceedings the tenants' interests in part of the island. The tenants had no title except occupation, and the War Department in some instances required representation to be taken out to

COMPULSORY PURCHASE—*continued.*
former occupiers:—*Held* (affirming the decision of Porter, M.R.), that the War Department were liable to pay the death duties, as well as the costs of raising personal representatives. *In re Bear Island Defence Works and Doyle* - - - App. 164
—— Payment out of Court—Small sum—Tenant for life - - - - - 445, 447
See PAYMENT OUT OF COURT.

CONTINGENT GIFT—*Will—Construction—Maintenance—Discretionary power—Vesting.*] A testator bequeathed certain property to his nephew upon his attaining twenty-five, and directed his trustees to accumulate the profits and invest them in trust for his said nephew on his attaining twenty-five. He also empowered his trustees, in their absolute discretion, to apply any part of said profits or the income thereof, for the advancement, maintenance, and education of his said nephew while under such age. The nephew died before attaining twenty-five:—*Held*, that the gifts of both capital and income were contingent, and therefore failed. *Russell* v. *Russell* - - - - - V.-C. 168

CONTINUING PROCEEDINGS—*Practice—Change of parties—Death of a defendant after judgment declaring the defendants liable for breach of trust—Order to continue proceedings on application of co-defendant seeking contribution.*] In an action against trustees for a breach of trust, one of the defendants paid into Court a sum for which the defendants were subsequently declared liable. Some years after the final judgment in the action a co-defendant, who at the time of the judgment had no means, died entitled, as alleged, to a policy of insurance which then became payable. On the application of the first mentioned defendant, who desired to seek contribution from the estate of the deceased, the Court made an order for continuing the proceedings against the personal representative of the latter. *Collings* v. *Wade* - V.-C. 89

CONTRARY INTENTION—Locke King's Act
See LOCKE KING'S ACT. [489

CONTRIBUTION—Co-defendants—Continuing proceedings - - - - - 89
See CONTINUING PROCEEDINGS.

CONVEYANCE—Claim after, for damage after sale—Sale by Court - - - 356
See COMPENSATION.
—— Incumbrance—Settled Land Act, 1882, s. 20, sub-s. 2 (ii.) - - - - - 353
See SETTLED LAND. 3.

COSTS—Charging order—39 & 40 Vict. c. 44
See CHARGING ORDER. [124
—— Compulsory purchase - - - 164
See COMPULSORY PURCHASE.
—— Transfer of mortgage—Transferor's solicitor
See TAXATION OF COSTS. [29

COVENANT — Fee farm-grant — Assignment—Executor - - - - - - 150
See EXECUTOR. 2.
—— Fee-farm grant—Assignment—Increased rent—Redemption - - - - 250
See LAND LAW (IRELAND) ACTS. 3.
—— Lease—Renewal - - - - - 265
See COVENANT TO RENEW.
—— Lease — Restraint on alienation — Increased rent—Order fixing fair rent - 363
See LAND LAW (IRELAND) ACTS. 4.

COVENANT TO RENEW—*Landlord and tenant—Lease for three lives—Covenant by landlord to renew within a limited period on tenant nominating a new life within a specified time from dropping of each life successively—Right to demand renewal on the death of the last surviving life, when new lives were not nominated on deaths of the first lives falling.*] A lease for three lives contained a covenant by the lessor that he would, upon the dropping of any of the lives which should first happen within a specified term, on the payment of a fine by the lessee, and on the nomination by the lessee of a new life within six months after the death of the person so happening first to die, add such new life in lieu of the person so happening first to die, and that he would, in like manner from time to time successively upon the failure of any and every other life in the said lease nominated, and thereafter to be successively nominated, on the like payment of a fine, successively thereafter during the same term, add the life or lives so successively nominated in the place and stead of each and every of the several persons so successively happening to die as aforesaid:—*Held* (by the Court of Appeal), that upon the true construction of this covenant, it prescribed as necessary for obtaining a renewal the condition that the lessee should renew regularly within six months from the fall of each life, so as always to maintain (except during such six months) the full number of three lives, and that if he failed so to renew within six months from the dropping of any life, he lost his right of renewal. *Hussey* v. *Domvile* (No. 2.) - - - - App. 265

CREDITORS—Secured—Proof against real estate—Application to prove against personal estate—Lapse of time—Funds in Court [1, 10, 530
See ADMINISTRATION ACTION.
—— Secured and unsecured—Insolvent company—Priority - - - - - 517
See WINDING UP.

CROPS—Authority to sell—Equitable charge
See MORTGAGE. 2. [449, 465

CROWN—Prerogative—Ferry—Post office 389
See FERRY.

DAMAGE—After sale by Court—Claim after conveyance - - - - - 356
See COMPENSATION.

DEATH, UNMARRIED—Widow—Settlement
See SETTLEMENT. [126

DESCRIPTION—Specific legacy—Ambiguity
See AMBIGUITY. [115

DIRECTION TO SETTLE—Executory trust
See ABSOLUTE GIFT. 1, 2. [119, 203, 326
See EXECUTORY TRUST.

DISCOVERY—*After judgment—Practice.*] Order for discovery granted to plaintiffs, who had obtained a judgment for an injunction against the defendant and an account of profits, discovery being necessary for the proper ascertainment thereof. *Hennessy* v. *Lavery* - - - - - - - V.-C. 87

DISCRETIONARY POWER—Maintenance—Vesting - - - - - - 168
See CONTINGENT GIFT.

DISTRIBUTIONS, STATUTE OF—Heir—Advancement - - - - - 156
See ADVANCEMENT.

DIVIDEND—Arrears of—Specialty debt 512
See LIMITATIONS, STATUTE OF.

DOMESTIC SERVANT—*Meaning of—Will—Legacy.*] A testator bequeathed to each domestic servant in his service at his death who should have been in his service for ten years or upwards the amount of two years' wages. The plaintiff was for over ten years in the testator's service as laundress, and received £60 a year, paid quarterly. She worked in a laundry in a yard adjoining the testator's house, but supplied her own food, and slept in a house of her own some distance away:—*Held*, that she was not a "domestic servant" within the meaning of the bequest. *Ogle* v. *Morgan* (1 De G. M. & G. 359) followed. *In re O'Gilby, deceased*; *Cochrane* v. *O'Gilby* - - - - - - - M. R. 525

DUTY—Finance Act, 1894, ss. 1, 2, 4, 7–9, 14
See EXECUTOR. 1. [418

—— On taking out administration—Compulsory purchase - - - - - - 164
See COMPULSORY PURCHASE.

ELECTION—*Will—Devise of "all my estate and interest in the lands of H."—Intention of testator—Parol evidence.*] A testatrix devised all her estate and interest in the lands of *H.* to *A.*, and appointed *B.* residuary legatee. She had no power to dispose of the lands of *H.*, which were settled by her husband's will on herself for life, with remainder to *B.* in fee:—*Held*, that the testatrix only intended to dispose of her estate and interest, if any, and not to dispose of property which was not her own, and that therefore no case of election arose. *Whitley* v. *Whitley* (31 Beav. 173) distinguished. Parol evidence of the intention of the testatrix not admissible. *Galvin* v. *Devereux* - M. R. 185

EQUITABLE ASSIGNMENT—Future crops
See MORTGAGE. 2. [449, 465

EQUITABLE MORTGAGE — *Registry Act* (6 *Anne, Ir., c.* 2)—*Deposit—Antecedent letters—Agreement in writing.*] *Held*, reversing the decision of the majority of the Court of Appeal in *In re Stevenson's Estate* ([1902] 1 I. R. 23), that the letters amounted to an agreement to create an equitable charge upon the estate, and in default of registration ranked after the mortgage to the appellants (objectors in the Court of the Land Commission). *Fullerton and Another, Appellants*; *Provincial Bank of Ireland, Respondents*
[H. L. 483

EQUITABLE MORTGAGE—*continued.*

EQUITY OF REDEMPTION — Clog — Independent collateral agreement - 498
See MORTGAGE. 3.

ESTATE DUTY—Settled Land—Payment by executor—Recoupment - - 418
See EXECUTOR. 1.

ESTATE TAIL—*Will—Construction — Rule in* Shelley's Case.] *A* devised fee-simple lands in trust for *B* and his assigns for the term of his natural life, and after his decease to the use of *B's* second son *C* and his assigns for the term of his natural life and his issue male in succession, so that every such son might take an estate for life, with remainder to his first and every subsequent son successively, according to seniority, in tail male. The will contained a proviso that *C* and his issue should take the name of *P.* when he or they became entitled, and in case of refusal the estate or estates limited for the life of such person so refusing should cease, and the subsequent limitations be accelerated. *B* died in 1882. *C* died in 1889, leaving two sons, *D* and *E*, who were both living at the death of *A.* *D* executed a disentailing deed:—*Held*, applying the rule in *Shelley's Case* (1 Rep. 93*b*), that *C* took an estate tail. *In re Baron Keane's Estate*
[Ross, J. 215

EVIDENCE—Merger - - - - 144
See MERGER.

—— Parol—Inadmissibility—Intention of limited owner—Devise—Election - - 185
See ELECTION.

EXECUTION OF POWER—*Power of appointment—Creation by will—Contemporaneous execution by will of donee—Death of donee in lifetime of donor—No power in existence at time of attempted execution—Invalidity.*] A testator directed that a sum of £1000, which he bequeathed to her, should be paid to his wife if living at his decease, and, if dead, that same should be paid to such persons as she by will should appoint; and in case of her not having made any disposition of same as before mentioned, that the said sum should go to whoever would be entitled as her next-of-kin, as of a person dying intestate and unmarried. By her will of the same date, appointing the same executors, and attested by the same witnesses, as her husband's will, the wife, after referring to the power, in exercise of it, bequeathed the said sum. She died before her husband:—*Held*, that the appointment failed,

EXECUTION OF POWER—*continued.*
and that the fund went to the wife's next-of-kin. *Jones* v. *Southall* (32 Beav. 31) followed and approved. *Sharpe* v. *M'Call* - - V.-C. 179

2. —— *Will—Special power of appointment—Gift of property "over which I have disposing power"—Intention to exercise power.*] A testator had by his marriage settlement power to appoint a rentcharge of £30, subject to the life interest therein of himself and his intended wife, amongst the children of the marriage, and in default of appointment his wife had a like power. He had no other power of appointment. The testator, by his will, devised and bequeathed to his executors all properties to which he might be entitled or was possessed of at the time of his death, or over which he had any disposing power, on trust to pay the income thereof to his wife for life, and after her death to his children, share and share alike. There were three children of the marriage. The testator's wife survived him, and by her will devised and bequeathed the residue of the property belonging to her, or over which she had any power of appointment or disposition, to her daughter *A.*:—*Held*, that there was no intention to exercise the power expressed in the will of the testator, and that the annuity passed under the will of his wife. *Sykes* v. *Carroll* - - - - - M. R. 17

EXECUTOR—*Estate duty on settled property—Payment by executor—Right of recoupment—Finance Act*, 1894 (57 & 58 Vict. c. 30), sections 1, 2, 4, 7, 8, 9, 14.] *B* mortgaged certain property to secure the payment of a sum of £10,000 to a son of a first marriage, with a proviso that the principal sum was not to be called in during *B's* life, if interest at 5 per cent. was punctually paid during his life. The mortgage shortly afterwards, on the occasion of the son's marriage, was vested in the trustees of his settlement. A few years afterwards, on the occasion of his second marriage, *B* agreed to bring into settlement property of sufficient value to produce £500 a year. Certain property was actually brought in at the time and settled on the usual trusts, which, however, proved to be only worth £297 a year. By his will *B* devised the residue of his property, after payment of his funeral and testamentary expenses, to his executors on trust. On *B's* death his estate was administered in Court. By an order of the Court leave was given to the trustees of the second settlement to prove for a sum of £6800 to make good the deficiency in the value of the property brought by *B* into the aforesaid settlement. The estate proved insolvent. The Revenue authorities, in assessing the "principal value" of the property for the purpose of the payment of estate duty, declined to allow credit for the aforesaid sums secured by the above-mentioned settlements. The estate duty was paid by the

EXECUTOR—*continued.*
executor, who claimed the right to be recouped by the trustees of the respective settlements a proportionate part of the duty on the sums realized by them on foot thereof:—*Held*, that the executor was entitled to be so recouped. *Cope* v. *Breslin* [V.-C. 418

2. —— *Fee-farm grant—Executors of original grantee—Assignment to purchaser—Covenant for rent—Liability for future breaches—22 & 23 Vict. c. 35, ss. 27, 28.*] Where the executors of an original grantee of a fee-farm grant assigned same to a purchaser, and subsequently, on the demand of the head landlord, set apart and retained out of the assets of the testator a sum sufficient to meet any future liability in respect of the covenant for rent in the fee-farm grant:—*Held*, that, under sections 27 and 28 of the 22 & 23 Vict. c. 35 (Lord St. Leonards' Act), the executors could not retain, and the head landlord could not require them to retain, any such sum as aforesaid, and that the same should be distributed among the persons entitled thereto. *Millar* v. *Sinclair* - - - - V.-C. 150

EXECUTORY TRUST—*Will—Construction—Direction to settle—To be settled on each marriage strictly on my said daughters, and on their demise on their lawful issue, share and share alike—Executory trust—Children of marriage attaining twenty-one, or daughters marrying, only to take.*] A testator bequeathed to each of his four unmarried daughters a sum of Stock, to be settled on each marriage strictly on his said daughters, and on their demise on their lawful issue, share and share alike, not to be subject to the control of any husband his daughters might marry; and in case of any of his said daughters dying and leaving no lawful issue to attain twenty-one or get married, then such Stock to be divided, share and share alike, between the survivors of his said four daughters. By a settlement made on the marriage of a daughter it was declared that the trustees of the will should hold the daughter's Stock upon trust for her for life, and after her decease for all and every her child and children, if more than one, share and share alike. There were four children of the marriage, one of whom died in the lifetime of the father and mother under age and unmarried. The other three attained twenty-one and survived their father, but one of them died in the lifetime of their mother:—*Held*, that the trust was executory, and that the settlement should have been for the mother for life, and then for sons attaining twenty-one and daughters attaining that age or marrying, and that the fund was divisible in thirds amongst the children who attained age. *Harris* v. *Loftus* (*No. 2*) M.R. 203

FAIR RENT—Order fixing—Covenant restraining alienation - - - - 363
See LAND LAW (IRELAND) ACTS. 4.

FAIR RENT—*continued.*

—— Order fixing—Statutory term—Commencement of—Land Law (Ireland) Act, 1887, s. 5 - - - - - - 424
See LAND LAW (IRELAND) ACTS. 5.

FEE-FARM GRANT—Assignment for value—Executor—Liability on covenants 150
See EXECUTOR. 2.

—— Increased rent payable on alienation 250
See LAND LAW (IRELAND) ACTS. 3.

—— Redemption of rent—*Bona fide* occupation
See REDEMPTION OF RENT. [58

FERRY — *Crown — Post Office — Londonderry Bridge Act*, 1877 (40 & 41 *Vict. c. cxevi.*).] Although Post Office officials, as servants of the Crown, are entitled to be carried free over ferries properly so called, such right does not apply to a ferry which a Corporation is empowered by statute to establish and work, but is under no obligation to maintain. *Attorney-General* v. *Londonderry Bridge Commissioners* - - - - - - M. R. 389

FRAUDS, STATUTE OF — *Sale of land—Memorandum in writing signed by purchaser — Signature of vendor's agent as "witness"—Binding agreement.*] Certain lands were sold to a purchaser by private treaty, through an auctioneer authorized to act as agent for the vendor, subject to conditions originally prepared for a sale by public auction, which had proved abortive. The purchaser signed the memorandum in writing attached thereto, acknowledging that he had purchased from the vendor the premises mentioned in the annexed particulars for the sum of £800, subject to the conditions of sale thereunto annexed, and that he had paid the deposit, and that he agreed to pay the balance on or before the date mentioned in the conditions of sale. The memorandum was also signed by the auctioneer as "witness." The vendor refused to complete:—*Held*, that the vendor was bound by the signature of the auctioneer, although merely purporting to sign as "witness," he having been duly authorized to sell by the vendor. *Wallace* v. *Roe* - - - - - - V.-C. 32

HEIRS—*Will—Construction—Devise of land in strict settlement — Gift of personalty on similar trusts—Ultimate gift to "right heirs and assigns"* — Persona designata.] A testator devised his real estate in trust for his eldest son for life, with remainders over in tail, remainder to his right heirs, and bequeathed his personalty on similar trusts, with an ultimate remainder to his "right heirs and assigns":—*Held*, that the personalty under the ultimate gift passed to the heir-at-law of the testator as *persona designata*, and not to his next-of-kin. *Skinner* v. *Gumbleton* - - - V.-C. 36

—— Advancement—Statute of Distributions 156
See ADVANCEMENT.

HUSBAND AND WIFE—Separate use—Receipt by husband of trust property—Fiduciary relation - - - - - 106
See TRUSTEE.

—— Settlement—Die unmarried - - 126
See SETTLEMENT.

IMPROVEMENTS—Settled Land - 49
See SETTLED LAND, 2.

INDEMNITY — *Landlord and tenant — Land Purchase Acts—Sale of indemnifying lands—Objection by owner of indemnified lands.*] The lands of *A* were sold in the Landed Estates Court, with the liability of indemnifying the lands of *B* from a perpetual annuity affecting both. The indemnity was then sufficient. The owner of *A* proposed to sell to his tenants under the Land Purchase Acts, and the owners of portion of *B* objected on the ground that the interest on the purchase-money would not be sufficient to meet the annuity:—*Held*, by Meredith, J., that the sales should be proceeded with. *In re D'Arcy Irvine's Estate* [MEREDITH, J. 41

—— Rent—Redemption—Deficient estate—Form of order - - - - - - 142
See LAND LAW (IRELAND) ACTS. 2.

INSOLVENT COMPANY—Judgment creditor—Priority - - - - - 517
See WINDING UP.

INTENTION—Contrary—Locke King's Act
See LOCKE KING'S ACT. [489

—— Creditor—Payment—Appropriation 245
See APPROPRIATION. 2.

—— Merger—Tenant for life - - 144
See MERGER.

—— Power—Execution - - - 17
See EXECUTION OF POWER. 2.

—— Testamentary disposition—Limited owner—Parol evidence - - - 185
See ELECTION.

INTEREST—*Mortgagor and mortgagee—Petition by incumbrancer—Amount of interest payable to incumbrancer—Statute of Limitations* (3 & 4 *Wm.* 4, *c.* 27), *s.* 42.] In an incumbrancer's petition matter, an incumbrancer who avails himself of the proceedings is not entitled to receive interest on his incumbrance which has accrued more than six years next before the filing of the petition for sale, such interest being barred under sect. 43 of 3 & 4 Wm. 4, c. 27. *Lloyd* v. *Lloyd* ([1903] 1 Ch. 385) only applies to a proceeding in the nature of a redemption suit. *In re Owen Lewis' Estate; Kirke, Petitioner.* - - - - - ROSS, J. 348

—— On mortgage debt—Agreement for increase of
See MORTGAGE. 3. [498

ISSUE—*Meaning of—Will—Construction.*] A testator bequeathed the sum of £600 upon trust, to pay the income thereof to his daughter *M.* for her separate use; and in case of her marrying and leaving lawful issue, then the said interest and

ISSUE—*continued.*
principal moneys were to pass to such issue in such manner as was described relative to the issue of her sister *J.*, which was as follows:—"In case of the death of my said daughter leaving issue, said interest money to be paid and payable to such issue, if more than one, share and share alike, for their support and education, and on their respectively attaining the age of twenty-one years, such principal sum, and such other sum as they or their said mother may be entitled unto in this will, shall be divided among them, share and share alike." After providing further for several events, which did not happen, the testator directed that in case of the death of any of his children leaving lawful issue, the share or shares of such child or children should go respectively to the lawful issue of such child or children, if more than one, share and share alike. *M.* survived testator, and having died, leaving several children and grandchildren, the question arose whether the £600 was divisible among her children *per capita*, or among her children and grandchildren *per stirpes*:—*Held*, that the fund was divisible among all her children and remoter issue living at the period of distribution. *Berry* v. *Fisher* - - - - - - V.-C. 484

—— Possibility of—Direction to settle - 119
See ABSOLUTE GIFT. 1.

JOINT DEBTORS—*Joint and several bonds—Judgments thereon—Release of one judgment debtor—Relationship of co-debtors.*] *A* and *B* executed their joint and several bonds in the penal sum of £6000, and judgment was marked on each bond separately. Subsequently, in 1845, the judgment creditors released the lands of *A*:—*Held*, that as the relationship between *A* and *B* was that of co-debtors, and not that of principal and surety, the release of *A* did not release *B*. *In re Gervais' Estate; Maude, Petitioner* - - - Ross, J. 172

JUDGMENT—*Registration—Priority—Charge on land created by will—Put in settlement on marriage of legatee—Interest in land*—3 & 4 *Vict. c.* 105, *s.* 22—13 & 14 *Vict. c.* 29, *s.* 4.] In 1806 a judgment was recovered against the then owner of the lands for sale in this matter. This judgment was re-registered on June 19, 1875, but was not again re-registered until March 4, 1898. In 1868 the then owner of the lands, subject to the judgment, by his will charged the lands with £8000 for his younger children. The testator died in 1878. One of his younger children, on her marriage, assigned her share of the £8000 to the trustees of her marriage settlement, which was executed on November 21, 1881, more than five years after the last preceding registration of the judgment:—*Held*, by the Court of Appeal (affirming the decision of Ross, J.), that the judgment was not postponed to the share of charge so settled by reason of its having been

JUDGMENT—*continued.*
allowed to go out of registration. *In re Baldwin's Estate* - - - - - - App. 338
—— Discovery after—Practice - - 87
See DISCOVERY.
—— Insolvent Company—Priority—Compulsory winding up - - - - 517
See WINDING UP.

JUDICATURE ACT—Sect. 28, sub-sect. 1
See WINDING UP. [517

JURISDICTION—Land Judge—Partition of yearly tenancy - - - 387
See PARTITION.
—— Originating summons—G. O. LV., R. 4 26
See ORIGINATING SUMMONS.

LACHES—Mortgagee—Proof against personal estate - - - - 1, 10, 530
See ADMINISTRATION ACTION.

LAND LAW (IRELAND) ACTS—*Landlord and tenant—Land Purchase Acts—Redemption of superior interests—Refusal of the owner of superior interest to appoint an arbitrator—Jurisdiction of the Land Judge to decide the dispute.*] Where the owner of a superior interest ordered to be redeemed refuses to appoint an arbitrator, the Land Judge can, under section 5 of the schedule to the Landlord and Tenant Act, 1870, decide the dispute and fix the price. *In re West's Estate* Ross, J. 137; [App. 141

2. —— *Landlord and tenant—Land Purchase Acts—Redemption of superior interest—Rent out of an estate indemnified therefrom—Form of order providing for future payment of the proportion of the rent so redeemed in case where an incumbrancer is not paid in full.*] Where the incumbrancers are not paid in full the form of order in *In re Kennedy's Estate* ([1902] 1 I. R. 364) should be varied by declaring the first unpaid incumbrancer entitled to the proportion of the rent redeemed, subject to redemption by the mortgagor. A petition for the sale of the proportion of the rent will be allowed to be filed. *In re Mulchinock's Estate; Blaquière, Petitioner* - - - - Ross, J. 142

3. —— *Landlord and tenant—Land Purchase Acts—Reservation of additional rent on alienation beyond a defined class—Time when alienation takes place.*] The additional rent covenanted to be payable in respect of an alienation to a person other than a child or grandchild of the person alienating (which covenant was held in *In re M'Naul's Estate*, [1902] 1 I. R. 114, to be a valid covenant to be inserted in a fee-farm grant) was *held* to have become payable upon the execution of the vesting order, and therefore the entire additional rent, and not the mere prospective liability thereto, is to be redeemed as an existing superior interest on a sale under the Purchase of Land (Ireland) Acts. *In re M'Naul's Estate* - - MEREDITH, J. 250

LAND LAW (IRELAND) ACTS—*continued.*

4. —— *Lease with covenant by tenant not to alienate without the consent of landlord, and if he did so, to pay an additional rent—Order fixing fair rent—Right to sell discharged from liability for additional rent—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *ss.* 1, 21—*Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33), *s.* 1.] A lease, made in 1875, contained a covenant by the lessee not to alienate without the consent of the landlord, and if he did so to pay an additional rent. After an order had been made, under the Land Law (Ireland) Acts, 1881 and 1887 (44 & 45 Vict. c. 49; 50 & 51 Vict. c. 33), declaring that the lessee was to be deemed a tenant of a present tenancy in the holding, and fixing the fair rent thereof, the tenant agreed to sell subject to the fair rent. Notices were served pursuant to section 1 of the Act of 1881. No claim or objection was made by the landlord:—*Held*, that the tenant could, without obtaining the consent of the landlord, sell the holding discharged from liability for the additional rent. The principles on which *In re Wright and Tittle's Contract* (29 L. R. Ir. 111) was decided held to apply. *In re Wahab and Clenaghan's Contract* - - - - - - V.-C. 363

5. —— *Statutory term, commencement of—Land Law (Ireland) Act*, 1881, *ss.* 4, 8—*Land Law (Ireland) Act*, 1887, *s.* 5—*Land Law (Ireland) Act*, 1896, *s.* 3.] A yearly tenant, whose rent was payable on May 1 and November 1 in each year, served an originating notice, seeking to fix a fair rent for the first statutory term, on October 4, 1887. The fair rent was fixed by an order dated March 31, 1888. The tenant served an originating notice, seeking to fix a fair rent for the second statutory term, on December 10, 1901. The landlord served notice to dismiss the originating notice as premature:—*Held* (affirming the decision of the Irish Land Commission), that the originating notice was not premature, and that the statutory term as well as the judicial rent began to run, under sect. 5 of the Act of 1887, from November 1, 1887. *M'Cann, Tenant; O'Neill, Landlord* - - APP. 424

—— *Bona fide* occupation—Redemption of rent 58
See REDEMPTION OF RENT.

—— Sale of indemnifying lands - - 41
See INDEMNITY.

LANDLORD AND TENANT—Land Law (Ireland) Acts.
See LAND LAW (IRELAND) ACTS.

—— Lease.
See LEASE.

—— Redemption of rent—*Bona fide* occupation—Time - - - - - - 58
See REDEMPTION OF RENT.

—— Yearly tenancy—Partition—Jurisdiction of Land Judge - - - - 387
See PARTITION.

LEASE—*For lives and years—Term of years, whether concurrent or reversionary.*] A lease made the 23rd day of August, 1821, demised certain lands from the 25th day of March last for and during the life and lives of *A*, *B*, and *C*, and the survivors of them, "and for and during the full end and term of ninety-nine years from thence next ensuing":—*Held*, by the Court of Appeal (reversing the decision of the Master of the Rolls), that the term of ninety-nine years was concurrent and not reversionary, that it began to run on the 25th day of March, 1821, and not on the death of the surviving life. *O'Connor and Small's Contract* (33 I. L. T. R. 43) overruled. *Duckett* v. *Keene* M. R. 409; [APP. 412

—— Building - - - - - - 154
See SETTLED LAND. 1.

—— Covenant restraining alienation—Order fixing fair rent - - - - - - 363
See LAND LAW (IRELAND) ACTS. 4.

—— For lives—Special covenant for renewal within a limited time - - 265
See COVENANT TO RENEW.

LEGACY—Charitable—Purposes to be selected by legatee - - - 227, 234
See CHARITY.

—— Contingent - - - - - - 168
See CONTINGENT GIFT.

—— of personal estate to heirs - - 36
See HEIRS.

—— Specific—Ambiguity—Right of selection
See AMBIGUITY. [115

—— to domestic servant . . . 525
See DOMESTIC SERVANT.

LETTERS—Leading up to equitable mortgage
See EQUITABLE MORTGAGE. [483

LIEN—Solicitor's - - - - - 124
See CHARGING ORDER.

LIMITED OWNER—Disposition by—Election
See ELECTION. [185

LIMITATIONS, STATUTE OF—*Specialty debt—Company—Ordinary shares—Arrears of dividend—Claim by shareholder—Contract.*] Dividends on ordinary shares in a Company had been declared and became payable more than six and less than twenty years before the claims for them were made by the shareholders:—*Held*, that the shafe certificates, as governed by the articles of association, constituted a specialty debt, and that consequently the arrears of dividend were recoverable after the lapse of six years. *In re Drogheda SS. Co.* M.R. 512

—— Interest on mortgage debt—Petition for sale by another incumbrancer - - 348
See INTEREST.

—— Trustee - - - - - - 106
See TRUSTEE.

LIVES—Omission to nominate—Renewable lease
See COVENANT TO RENEW. [265

LOAN FUND SOCIETY—*Liability of trustees —Neglect of duty—Omission—False accounts and balance-sheets — Dishonesty of clerk — Loan Fund Society (Ireland) Act* (6 & 7 *Vict. c.* 91)—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61.)] In 1886 a Loan Fund Society was formed at *M.* in the county of Cork, under the provisions of the Act 6 & 7 Vict. c. 91, with the object of raising money by debentures and by receiving deposits for the purpose of granting loans to the industrial classes in the district. Under the Act, and the rules of the Society framed under it, the business of the Society was to be conducted by a treasurer, trustees, and a committee of management; the property and money were vested in the trustees, and the treasurer had the management of the funds and accounts, and also had charge of the books. The committee, of whom three should form a quorum, elected the trustees, treasurer, and clerk; they were to meet weekly to decide on applications by borrowers for loans, which were to be made on a prescribed form, and two solvent sureties were required for each loan. The note for the loan was given in the name of the treasurer, and was repayable by weekly or monthly instalments. An abstract of the accounts of the Society for each year was to be made out in a prescribed form, with a statement of the property and effects of the Society, and of its debts and liabilities, and sent to the Loan Fund Board, and an annual meeting was to be held every year for the purpose of inspecting the accounts. By sect. 36 of the Act, the trustees or officers were not personally liable, unless by express agreement. When the Society was started in 1886 the parish priest was appointed treasurer, and *O.* and *R.* were appointed trustees. The treasurer died in 1898, when *O.* was appointed treasurer, and *M.* was appointed trustee instead of *O.* *M.* only attended a few meetings of the committee, and then resigned. In 1896 a lady was appointed clerk, and she took the entire management into her hands. All applications for loans were filled in by her, and one of the trustees gave her cheques for the amount she asked for, without seeing to its application. She made out false records of meetings, and deceived by false books, and by forged or unreal vouchers, the auditor sent down annually by the Loan Fund Board. The abstracts of accounts were made out by her, and the account for 1898, containing false entries, was signed by *O.* and *R.*, and the account for 1899 was signed by *R.* alone. All the rules for the protection of the members were neglected, and in four years the entire funds of the Society had disappeared. In an action by the debenture-holders against *O.* and *R.*, claiming that they were liable to make good the loss, the Master of the Rolls having dismissed the action:—*Held*, by the Court of Appeal (reversing the decision of the Master of the Rolls), (1) that, although the position of *O.* and *R.* towards the debenture-holders was not that of trustee and *cestui que trust*, they were guilty of such negligence and default in discharge of the duties imposed on them by the Act and rules, that they were liable to make good the loss; (2) that they were not protected from liability by the Public Authorities Protection Act. *O'Brien* v. *Mitchelstown Loan Fund Society* M. R. 282; App. 298

LOCKE KING'S ACT—*Will—Mortgage debt—* 17 & 18 *Vict. c.* 113—*Amendment Act* (30 & 31 *Vict. c.* 69)—*Contrary intention.*] A testator bequeathed his business and the premises in which it was carried on, which were leasehold premises, to his son *W.*, subject to payment of all debts and liabilities owing in respect of the business; he bequeathed his personal estate on trust for conversion, and directed his funeral and testamentary expenses, debts, and legacies to be paid out of the proceeds; and, subject thereto, for his children equally. The testator had deposited with his bankers the lease of the business premises to secure a private debt:—*Held*, that the intention of the testator was that *W.* should take the business premises subject to the trade debts only; that this was a declaration of intention contrary to Locke King's Act; and that the business premises were exonerated from liability in respect of the private debt secured by equitable mortgage. *In re Nevill* (59 L. J. Ch. 511) considered and followed. *Thompson* v. *Bell* - - - - M. R. 489

LOST GRANT—Profit *a prendre*—Presumption *See* Prescription. [92, 105

MAINTENANCE—Discretionary power—Vesting - - - - - - - 168 *See* Contingent Gift.

MARSHALLING—Securities—Voluntary deed *See* Appropriation. 1. [235

MASSES — Charitable purpose — Selection by legatee - - - - 227, 234 *See* Charity.

MERGER — *Intention—Examination of all the circumstances of the case.*] *A*, being entitled to an estate for life in the lands of *B*, subject to (amongst others) a first incumbrance for £900, and a charge for younger children, with power to mortgage, purchased the incumbrance, which was conveyed to a trustee for him. He mortgaged the lands subject to the charges. By his will he directed certain other lands to be sold for the purpose of paying off the charges and incumbrances on the lands of *B*; and he empowered his trustees, during the minority of his son (to whom he devised the lands of *B*, and bequeathed his residuary personal estate), to apply the surplus rents of all the lands, and also to sell his personal estate, and apply the proceeds thereof, for the same purpose. By a codicil he increased the amount of the charge for

MERGER—*continued.*
younger children:—*Held*, that the charge of £900 merged. *In re Lloyd's Estate*; *Hill, Petitioner*.
[Ross, J. 144

MISTAKE—User—Prescription - - 92, 105
See PRESCRIPTION.

MORTGAGE—*Construction—Proviso for redemption—Stock—National Debt Conversion Act*, 1888, *section* 21 (1).] Trustees sold, in 1854, a sum of £4226 11*s.* 4*d.*, 3 per cent. Irish Consolidated Annuities, and lent the proceeds on a mortgage. The proviso for redemption provided for the repurchase and transfer into the names of the trustees "of the said sum of £4226 11*s.* 4*d.* Government 3 per cent. Irish Consolidated Annuities, . . . or, in case the said Government Irish 3 per cent. Consolidated Annuities shall have then ceased to exist," provided for the repurchase of "the like amount of some other Government Stock or Funds, producing at the time of such repurchase and transfer dividends at the rate of £3 per cent per annum at the least." Government 3 per cent. Irish Consolidated Annuities subsequently ceased to exist. The mortgagor offered to redeem by the transfer of £4226 11*s.* 4*d.* New 2½ per cent. Consols:—*Held*, that the contract did not come within section 21 of the National Debt Conversion Act, 1888, as a contract "to transfer generally any amount of 3 per cent. Stock," and that a 3 per cent. Stock should be transferred. *In re Hall's Estate*; *Talbot, Petitioner* - - - - - Ross, J. 475

2. —— *Construction — Valuable consideration—Equitable assignment — Power to let and manage lands—Future crops—Bill of sale.*] *M.*, who was possessed of a farm at *B.* in the county of Kildare, was in the habit of employing the defendants, who were auctioneers, to let the grazing and manage the land for her. The defendants sometimes paid in advance the rents and taxes, and when they let the meadows or sold the crops they received the money, and after deducting what was due, they paid the balance to *M.* *M.* had deposited with the defendants the title-deeds of the farm by way of equitable mortgage. In November, 1900, *M.* applied to the plaintiff for advances to pay off the amount due to the defendants, and also some rent that was due, which the plaintiff agreed to make upon the security of the agreement hereinafter stated, and also upon getting up the title-deeds. On 29th December, 1900, *M.* signed an agreement, whereby, in consideration of the plaintiff paying for *M.* £200, she assigned to the plaintiff, as security therefor, the authority to let and manage her farm, for grazing, meadow, or other purpose, and out of the proceeds of said letting, to retain such sums to liquidate the above, or any other sum advanced to *M.*, or paid by the plaintiff on her account; and *M.* appointed the plaintiff her auctioneer and salesman, to dispose of same at such time and place as he thought best,

MORTGAGE—*continued.*
and to retain the sums advanced out of the proceeds, together with commission and expenses, and hand *M.* the balance; this agreement to be irrevocable. The plaintiff paid off the defendants, and paid the rent due. The plaintiff, in January, 1901, advertised the meadows for grazing, but owing to the action of *M.* the attempt to let them proved abortive, and the grass was allowed to spring into meadow. On the 5th July the plaintiff advertised the meadows for sale, but they were not sold. *M.* subsequently employed the defendants to auction her meadows, and they were sold on the 16th July. On the 19th July the plaintiff's solicitor wrote to the defendants, informing them of the agreement of the 29th December, 1900, and cautioning them not to pay over the proceeds of the sale to *M.* Notwithstanding this, the defendants paid over the balance of the money to *M.*, after deducting the expenses of the auction and commission:—*Held* (by the Master of the Rolls), that the agreement of the 29th December, 1900, was an equitable mortgage of the land, and that it also conferred upon the plaintiff a specific interest in the crops on the farm, and in the purchase-money thereof when sold, and that the plaintiff was entitled to have the amount of his debt and interest declared well charged upon the farm and crops. *Held* (by the Court of Appeal), that the defendant, having had notice of the agreement of the 29th December, 1900, before he paid the balance of the proceeds of the sale to *M.*, was liable to the plaintiff for the amount of the balance. *Held*, by Walker, L.J. (agreeing with the Master of the Rolls), that the agreement of the 29th December, 1900, conferred an equitable charge in favour of the plaintiff on the land and growing crops. *Coonan* v. *O'Connor*
[M. R. 449; APP. 465

3. —— *Redemption—Collateral agreement, whether a "clog" on—Independent agreement—Provision for increase of interest on mortgage debt—Collection of rents by mortgagee—Agency fees.*] *M.*, being previously indebted to *T.* in the sum of £1500 secured by mortgages on land, with interest at 5 per cent., in 1878, in consideration of a further advance of £300, gave his bond (on which judgment was subsequently entered, and which was registered as a judgment mortgage against the lands already mortgaged), and executed a collateral agreement by which he appointed *T.* his agent over the mortgaged lands, and empowered him to charge agency fees, and agreed to pay 6 per cent. interest on the whole £1800 due by him to *T.*, being 1 per cent. additional on the £1500 secured by the mortgages. This additional 1 per cent. rate of interest was not by the agreement charged on the lands:—*Held*, that the agreement of 1878, being a new contract for a fresh consideration, had not the effect of imposing a fetter on the equity of redemption by

MORTGAGE—*continued.*
reason of increasing the rate of interest payable, or by reason of making the mortgagee the agent of the mortgagor to receive the rents, and empowering him to charge agency fees. *Maxwell* v. *Tipping* [M. R. 498
—— Equitable—Antecedent letters - 483
See EQUITABLE MORTGAGE.
—— Interest—Petition for sale by another incumbrancer - - - - - - 348
See INTEREST.
—— Proof in administration action—Appropriation of payments - - - - 245
See APPROPRIATION. 2.
—— Proof in administration action—Delay
See ADMINISTRATION ACTION. [1, 10, 530
—— Settlement—Estate duty—Executor of mortgagor - - - - - - 418
See EXECUTOR. 1.
—— Transfer—Costs of transferor's solicitor 29
See TAXATION OF COSTS.
—— Will—Locke King's Act—Contrary intention
See LOCKE KING'S ACT. [489
NEGLIGENCE—Trustees—Loan fund society
See LOAN FUND SOCIETY. [282, 298
NEXT-OF-KIN—Bequest of personalty to heirs
See HEIRS. [36
NOTICE—Equitable assignment—Proceeds of sale - - - - - 449, 465
See MORTGAGE. 2.
—— Secret trust—Tenants in common 73, 79
See SECRET TRUST. 2.
ORDERS-GENERAL—1884 (15th April)—Solicitors' Remuneration Act, 1881 29
See TAXATION OF COSTS.
—— 1891 (18th Jan.)—LV., R. 4 - - 26
See ORIGINATING SUMMONS.
ORIGINATING SUMMONS—*Jurisdiction—Question between annuitant and devisee of land as to personal liability of devisee to pay annuity—Order LV., Rule 4—Practice.*] A testator devised and bequeathed freeholds and leaseholds to *F.*, with a condition for, or subject to, payment of annuities to *E.* and *M.* *E.* and *M.* took out an originating summons, claiming a declaration that *F.* was personally liable to pay the annuities and an order for payment by him accordingly:—*Held*, that the case did not come within Order LV., Rule 4. *Mansfield* v. *Mansfield* - - - V.-C. 26
PARTITION—*Land Judges' Court—Jurisdiction—Yearly tenancy.*] The power which the Land Judge has to partition includes a power to partition a yearly tenancy. *In re Bingham's Estate*; *Bingham, Petitioner* - - - Ross, J. 387
PAYMENT—Appropriation - 235, 245
See APPROPRIATION. 1, 2.
—— Estate duty—Executor of settlor—Recoupment - - - - - - 418
See EXECUTOR. 1.
PAYMENT OUT OF COURT—*Small sum—Tenant for life—Undertaking to expend in permanent improvements—Lands Clauses Consolidation Act*, 1845, *sections* 69–72—*Settled Land Act*, 1882, *sections* 21, 25, 32.] A sum of £76 16*s.* 4*d.*, lodged in Court as purchase-money of lands taken under the Labourers (Ireland) Act, was ordered to be paid out to a tenant for life after advertisements, on his undertaking to expend it in permanent improvements as if it was capital money under the Settled Land Acts. *In re Coleraine Rural District Council*; *Ex parte Lyle* - - - - M. R. 445
2. —— *Small sum—Tenant for life—Undertaking to expend in permanent improvements—Lands Clauses Consolidation Act*, 1845, *sections* 69–72—*Settled Land Act*, 1882, *sections* 21, 25, 32.] A sum of £41 17*s.* 4*d.*, lodged in Court as purchase-money of lands taken under the Labourers (Ireland) Acts, was ordered to be paid out to a tenant for life without requiring advertisements, on his undertaking to expend it in making an avenue to the mansion-house on the settled lands. *In re Coleraine Rural District Council*; *Ex parte Giveen* [M. R. 447
PERSONA DESIGNATA—*Will—Construction—Gift, whether to class or* personæ designatæ.] A testator, among other legacies, gave the sum of £200 to each of his three sisters, whom he named, and devised his farm, with all household furniture, &c., in the dwellinghouse and live stock, &c., subject to their mother's life interest therein, to his "said three sisters," or such of them as should survive him, in equal shares, as tenants in common. The testator bequeathed the residue of his property to a charitable institution. By a codicil he revoked the legacy of £200 given to one of his sisters, and also the bequest in remainder to her of a share in the farm, &c., and in other respects confirmed his will. Testator's mother and three sisters survived him:—*Held*, that the bequest of the farm, &c., under the terms of the will, passed to the sisters, not as members of a class, but as *personæ designatæ*, and that consequently the revoked share fell into the residue. *Orford* v. *Orford* - V.-C. 121
—— Will—Gift of personalty to heir-at-law 36
See HEIRS.
PETITION—Costs—Charging order - 124
See CHARGING ORDER.
POST OFFICE—Servants of—Ferry - 389
See FERRY.
POWER—Discretionary—Maintenance—Vesting
See CONTINGENT GIFT. [168
—— Execution—Intention to exercise - 17
See EXECUTION OF POWER. 2.
—— Testamentary—Will exercising—Death of appointor in donor's lifetime—Invalid execution - - - - - 179
See EXECUTION OF POWER. 1.

PRACTICE—Administration action—Mortgagee—Deficiency of security—Proof against personal estate—Lapse of time 1, 10, 530
See ADMINISTRATION ACTION.
—— Continuing proceedings—Contribution—Co-defendants - - - - - 89
See CONTINUING PROCEEDINGS.
—— Costs—Charging order—Solicitor - 124
See CHARGING ORDER.
—— Discovery—After judgment - - 87
See DISCOVERY.
—— Land Judge—Interest on incumbrance—Petition for sale by another incumbrancer
See INTEREST. [348
—— Land Judge—Partition—Yearly tenancy 387
See PARTITION.
—— Land Judge—Redemption of superior interests—Refusal to appoint arbitrator 137, 141
See LAND LAW (IRELAND) ACTS. 1.
—— Originating summons—Question determinable upon - - - - - - 26
See ORIGINATING SUMMONS.
—— Payment out of Court—Tenant for life—Small sum - - - - - - 445, 447
See PAYMENT OUT OF COURT. 1, 2.
—— Sale—Damage after—Claim by purchaser after conveyance - - - 356
See COMPENSATION.
—— Taxation of costs - - - - - 29
See TAXATION OF COSTS.

PRESCRIPTION—*Turbary, right of—Profit* a prendre—*Enjoyment as of right—Presumption of lost grant—Mistake.*] Sub-tenants of lands held under a lease for lives renewable for ever cut turf, during a period exceeding sixty years, for their own use, on lands of the lessor not included in the demised premises, which comprised bog as well as arable and pasture. They believed that they had a right to do this, as the lease contained words giving leave to cut turf for firing on the lands of the lessor. The lease, in fact, contained no such words, but a lease of adjoining lands, made between the same parties, did contain such words. The cutting was permitted by the lessor, as his agent believed that the right existed under the lease. An injunction was sought to restrain the tenants from cutting turf:—*Held*, that a lost grant should be presumed. *De La Warr* v. *Miles* (17 Ch. D. 535) applied. *Dawson* v. *M'Groggan* M. R. 92; [APP. 105

PRESUMPTION—Lost grant—Profit *a prendre*
See PRESCRIPTION. [92, 105

PRIORITY—*Claimants on rents collected—Distribution according to equities arising after collection.*] Prior to the appointment of a receiver over the lands of *A*, *B*, and *C*, the trustees for the infant owner, tenant in tail, had collected certain rents. *R.*, an annuitant, whose annuity, though not in arrear when the rents were collected, was in arrear when

PRIORITY—*continued.*
the application was made to the Court, was the first chargeant on *A* and *B*. Upon *C* an incumbrance for £25,000, the interest on which was in arrear at the date of the collection of the rents, and still in arrear, was the first charge. The trustee applied to Ross, J., by originating summons, for directions as to the application of the rents:—*Held*, that they should be applied having regard to the equities affecting them when the matter was brought before the Court on summons, and not when they were collected, and consequently that *R.* should be paid the rents arising out of *A* and *B*, and the incumbrancer for £25,000 those arising out of *C*. *In re Bagot*; *Bagot* v. *White* - - - Ross, J. 370
—— Judgment—Re-registration—Charge—Interest in real estate—Settlement 338
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—— Secured and unsecured creditors—Judgment—Insolvent company—Judicature Act, sect. 28, sub-sect. 1 - - - 517
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PROFIT A PRENDRE—Turbary—Lost grant
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PROOF OF DEBT—Administration action—Appropriation of payments - 245
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—— Administration action—Mortgagee—Lapse of time - - - - - 1, 10, 530
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—— Mortgage—Stock - - - - - 475
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—— Rent - - - - - - - - 58
See REDEMPTION OF RENT.
—— Superior interest—Increased rent on alienation - - - - - - 250
See LAND LAW (IRELAND) ACTS. 3.
—— Superior interest—Indemnity against rent—Form of order - - - 142
See LAND LAW (IRELAND) ACTS. 2.
—— Superior interest—Refusal to appoint arbitrator - - - - 137, 141
See LAND LAW (IRELAND) ACTS. 1.

REDEMPTION OF RENT—*Landlord and tenant—Redemption of Rent (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 57, *s.* 1)—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47, *s.* 7, *sub-sect.* 1)—Bona fide *occupation—Subletting—Crucial date at which* bona fide *occupation must exist.*] Section 7, sub-section 1 (*b*), of the Act of 1896, which provides that for the purpose of the Land Law Acts the tenant of a holding shall be deemed to be in *bona fide* occupation thereof, notwithstanding that part of the holding is, otherwise than in breach of the contract of tenancy or of a statutory condition, sublet to or in the occupation of another person,

REDEMPTION OF RENT—*continued.*
if, in the estimation of the Court, a part, not less than seven-eighths in value of the holding, remains in the *bona fide* occupation of the tenant, and if the subletting was made before the Act of 1887, or was in substitution for a letting existing at that date, applies to the case of a grantee under a fee-farm grant seeking to redeem his rent under the Redemption of Rent Act, 1891. The *status* as to occupation of the grantee is to be ascertained at the date of his application; therefore, the *status* of a grantee who was in *bona fide* occupation of upwards of seven-eighths of the holding at the date of his application is sufficient, though less than that amount of the holding was in his occupation at the dates when the Acts of 1891 and 1896 respectively passed. *Nelson* v. *Headfort* (18 L. R. Ir. 407) distinguished. *Cowell, Grantor*; *Buchanan, Grantee* [App. 58

REGISTRATION—Judgment—Omission to re-register—Priority - - - 338
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—— Written contract—Equitable deposit—Antecedent letters - - - - - 483
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RELEASE—One of several co-debtors - 172
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—— Increased—Alienation - - 250, 363
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—— Indemnity - - - - - - 142
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—— Received by trustees—Equities arising between receipt and distribution - 370
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REVENUE—Estate duty—Payment by executor—Settled land—Recoupment - 418
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—— By Chancery Division—Compensation—Claim after conveyance for damage after sale
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—— By Land Commission—Indemnifying land
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—— Compulsory purchase - - - 164
See Compulsory Purchase.

—— Covenant restraining alienation—Increased rent—Order fixing fair rent—Effect of 363
See Land Law (Ireland) Acts. 4.

—— Superior interests—Redemption 137, 142, 250
See Land Law (Ireland) Acts. 1–3.

SECRET TRUST—*Will.*] A testator left all his property to his wife, resting satisfied that she would faithfully carry out his wishes regarding the same in the interest of their children, the particulars of which she was aware of. The will was witnessed by two of the children. The testator about the same time wrote a letter addressed to his wife, which stated his wishes as to the disposal of the property he had left to her by his will, and contained the following sentence:—"I think this disposition is as fair as I can make it, and I hope it will satisfy all; but you, of course, may modify it if you think or find it desirable." Shortly afterwards the testator read out the will and letter in the presence of his wife and children, and she acquiesced in it:—*Held*, that the circumstances were such as would make the letter a binding trust, if it were intrinsically capable of creating a trust; but that, by reason of the sentence in question, there was no binding trust. *Sullivan* v. *Sullivan* [M. R. 193

SECRET TRUST—*continued.*
2.—*Will—Charity—Mortmain Act* (7 & 8 *Vict. c.* 97)—*Devise of land—Tenants in common—Death of testator within three months—Validity of bequest.*] A testator devised certain houses, and also a legacy of £600 charged on the remainder of his property, which comprised landed property, to three persons absolutely, as tenants in common, coupled with a secret trust for charitable purposes. One of the legatees at the time the will was made was informed of the trust, the other two had no knowledge of it until after the death of the testator. The testator died within three months after making his will:—*Held*, by Chatterton, V.-C., that the bequest of the three houses failed, and also the legacy of £600 so far as same was payable out of the real estate or chattels real of the testator. *Held*, by the Court of Appeal (varying the order of the Vice-Chancellor), that the bequest of the one-third of the property to the trustee, who was aware of the trust, was invalid, but that the other two-thirds went absolutely to the other two devisees. *Geddis* v. *Semple* - - V.-C. 73; App. 79

SELECTION—Legatee—Ambiguity - 115
See Ambiguity.

—— Legatee—Charitable purposes - 227, 234
See Charity.

SEPARATE USE—Receipt by husband of trust property - - - - - 106
See Trustee.

SERVANT—Legacy to—Meaning of "Domestic" - - - - - 525
See Domestic Servant.

SETTLED LAND—*Settled Land Acts—Tenant for life—Building lease—Extended term—Settled Land Act*, 1882, *sect.* 10, *sub-sect.* 1 (45 & 46 *Vict. c.* 38).] Leave given to the tenant for life of a settlement to grant a building lease of settled land for 500 years, under the Settled Land Act, 1882, section 10, sub-section 1. *In re O'Connell's Estate* V.-C. 154

2.—*Tenant for life—Power to charge inheritance—Improvements—Additions and alterations with a view to letting—Drainage—Hot water supply—*

SETTLED LAND—*continued.*

Settled Land Acts, 1882 (45 & 46 *Vict. c.* 38), *s.* 25; 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s.* ii.] *A* was tenant for life under a will of house property, with remainder to *B* in fee. One of the houses having become vacant, *A*, in order to let it, but without consulting *B*, employed a contractor to put in a bath and hot water supply and a new system of drainage, with the result that the house was let at a higher rent. *A* died shortly afterwards. The contractor, who had taken out administration to *A* as a creditor, sought to have the cost of the works charged on the inheritance as being "improvements" authorized by the Settled Land Acts. There was no capital money arising under the Acts:—*Held*, (1) assuming the works were "improvements" authorized by the Acts, that there was no power under the Acts to charge the cost of executing them on the inheritance; (2) that the new system of drainage was an "alteration in buildings reasonably necessary or proper to enable the same to be let," within the meaning of s. 13 (ii) of the Act of 1890. *Semble*, that the bath and hot water supply were also within the same sub-section. *In re Gray*; *Standing* v. *Gray* M. R. 49

3. —— *Tenant for life—Title—Incumbrances—Conveyance—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *sect.* 20, *sub-sect.* 2 (ii.).] By will, dated October 17, 1854, a testator resident in Scotland devised his real estate, including the lands of *B.* in Ireland, to his six daughters for life, with remainders over. Testator died in 1857, having, prior to his death, advanced the sum of £1500 to the husband of one of his daughters, and £475 to the husband of another daughter. In 1882, by deed of family arrangement, the real estate of testator was conveyed to trustees, to hold on the trusts of the will, charged, as to the life estates of the two daughters therein, with repayment of the sums of £1500 and £475 advanced to their husbands respectively. An order was subsequently made for the administration of testator's real and personal estate in Ireland, and the lands of *B.* were sold to a purchaser:—*Held*, that the sums of £1500 and £475 were not money "actually raised" within the exception to section 20 of the Settled Land Act, 1882, and that the persons who together constituted the tenant for life of the settled lands could convey to the purchaser discharged from these two sums. *Connolly* v. *Keating* (No. 1) - - M. R. 353

—— Payment out of Court to tenant for life—Small sum—Practice - 445, 447
See PAYMENT OUT OF COURT. 1, 2.

SETTLEMENT—*Construction—Design—Wife's property—Ultimate trust for next-of-kin of wife—"Die unmarried"—Widow's settlement.*] By settlement executed prior to the second marriage of *M.* (then a widow) a fund, which was her property, was assigned to trustees, in trust for herself for life for her separate use, with power of appointment after her death. In default of appointment the income was to be paid to *W.* (the intended husband) for life, and after his death the principal was to go to such child or children of *M.* by *W.*, or by her former husband, in equal shares, as should be living at the death of *W.* In case there should be no child or other issue of *M.* entitled under the previous provisions of the settlement, there was an ultimate trust in favour of "such person or persons as would, under the Statute of Distributions, be entitled to the personal estate of *M.*, in case she had died intestate and unmarried." *M.* did not exercise the power given to her by the settlement. She had no child by *W.* She had one son by her first marriage, who survived her, but died before *W.*, without leaving issue:—*Held*, that "unmarried," in the ultimate trust of the settlement, meant "*discovert* at the time of death," and that consequently the representatives of the deceased son of the first marriage were entitled to the fund. *In re Woodhouse's Trusts* - - M. R. 126

SETTLEMENT—*continued.*

—— Direction for - - - 119, 203, 326
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SOLICITORS' REMUNERATION ACT—Transfer of mortgage - - 29
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SPECIALTY DEBT—Arrears of dividend 512
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1 & 2 Vict. c. 109—Tithe rentcharge, ss. 7, 9 [429
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3 & 4 Vict. c. 105—Judgments, s. 22 - 338
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7 & 8 Vict. c. 97—Charitable Donations and Bequests - - - - - 73, 79
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8 & 9 Vict. c. 18—Lands Clauses, ss. 69–72 [445, 447
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13 & 14 Vict. c. 29—Judgments, s. 4 - 338
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44 & 45 Vict. c. 38—Settled Land, s. 20, sub-s. 2 (ii.) - - - - - - 353
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44 & 45 Vict. c. 49—Land Law, ss. 1, 21 363
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57 & 58 Vict. c. 30—Finance, ss. 1, 2, 4, 7–9, 14 - - - - - - - 418
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59 & 60 Vict. c. 47—Land Law, s. 3 - 434
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TAXATION OF COSTS—*Practice—Solicitors' Remuneration Act*, 1881—*General Order*, 1884, *Sch. I., Part I.—Transfer of mortgage—Costs of transferor's solicitor.*] The solicitor for the transferor of a mortgage is to be remunerated for showing any title required and for approving of the transfer under the old system, as altered by schedule II. of the General Order, 1884. *In re Briscoe and Smith* - - - - - - - M. R. 29
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TENANT FOR LIFE AND REMAINDERMAN — Conveyance — Incumbrance — Title—Settled Land Act, 1882, s. 20, sub-s. 2 (ii) - - - - 353
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TITHE RENTCHARGE—1 & 2 *Vict. c.* 109, *ss.* 7, 9—*Charge on "perpetual estate," not on fee-simple.*] Tithe rentcharge is a burden on the first estate of inheritance, and not on the fee-simple of the lands, unless the fee-simple is or becomes the first estate of inheritance. Accordingly, where the owner of a lease for lives renewable for ever, who, as owner of an estate equivalent to a perpetual estate, was liable to pay the tithe rentcharge, assigned his interest, to avoid liability for future rent, to a pauper, and default was made in payment of the tithe rentcharge by the assignee, it was held that the arrears of the rentcharge could not be recovered from the owner in fee. *Irish Land Commission* v. *Annesley* - M. R. 429
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TRUSTEE—*Limitations, Statute of—Trust, express or constructive — Receipt of trust fund — Husband and wife—Trust for separate use—Fiduciary relation — Agency — Breach of trust — Accounting party—Rate of interest chargeable—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.] The wife of *O.* was entitled, under the will of her mother *M.*, to a life interest for her separate use in a certain business and trade assets, with remainder on her death (in the events which happened) to the persons who would be beneficially entitled to her personal estate if she had died intestate and unmarried. The business and trade assets were vested in trustees under the will of *M.*, and with their consent *O.* carried on the business for his wife as manager. The wife died in 1890. From 1890 till his death, in 1899, *O.* remained in possession, and dealt with the business and trade assets as if they were his own. He had full notice and knowledge of the trusts of the will of *M.* By his own will he left a legacy and a share of the residue of his estate to each of the persons who would have been sole next-of-kin of his wife, if she had died unmarried and intestate, coupled with a condition that each of them should execute a release of all claims he or she might have against the assets of *M.* under the provisions of her will:—*Held*, that *O.* having retained possession of the business and trade assets after his wife's death, with full knowledge of the trust attaching thereto, and having dealt with the property as if it were his own, his estate was liable to the estate of *M.* without regard to lapse of time or the Statute of Limitations. *Held* also, that, in exercise of the discretion of the Court, and under the circumstances of the case, four per cent. per annum should be allowed as the rate of interest chargeable against the estate of *O.* from his wife's death till his own death, in respect of the amount invested in or represented by the furniture on the business premises and the stock-in-trade, and debts due to the business. *M'Ardle* v. *Gaughran* [M. R. 106
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—— Class or *personæ designatæ*—Gift to testator's sisters - - - - - - 121
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—— Masses—Gift for—Selection by legatee—Uncertainty - - - 227, 234
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—— Suvivors—Gift over to—Longest liver taking absolutely - - - - 326
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WINDING UP — *Companies Acts — Insolvent Company—Secured and unsecured creditors—Priorities—Judgment creditor—Bankruptcy rule—Judicature Act*, 1877 (40 & 41 *Vict. c.* 57), *sect.* 28, *sub-sect.* 1. In the compulsory winding up of an insolvent Company in the Court of Chancery, under the Companies Acts, 1862 and 1867, the effect of section 28, sub-section 1, of the Judicature Act, 1877, is that the rules of bankruptcy as to secured and unsecured creditors shall prevail, and consequently judgment creditors of a Company in liquidation, who had taken no active steps to enforce their securities, are not entitled to be paid in priority to the ordinary creditors of the Company. *In re Leinster Contract Corporation, Limited* [M. R. 517

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THE END.